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CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs claims of immunity in civil actions against foreign states in U.S. courts. The FSIA's various statutory exceptions to a foreign state's immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, and 1607, have been subject to significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2014 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Definition of "foreign state" in the FSIA

As discussed in *Digest 2011* at 284-87, the United States filed a brief in the U.S. Court of Appeals for the Second Circuit in 2011 asserting that the European Community[*] ("EC"), while not a foreign state (because the President has not recognized it as such), qualifies as an "agency or instrumentality of a foreign state" as defined in the FSIA, and accordingly, there was a basis for federal diversity jurisdiction over the EC's state law claims against RJR Nabisco. On April 23, 2014, the Second Circuit decided the case, agreeing that the district court had jurisdiction under the federal diversity jurisdiction statute. *EC v. RJR Nabisco, Inc.*, 764 F.3d. 129 (2d Cir. 2014). The Court of Appeals did not address the question of whether the EC could be considered a foreign state, but did

[*] Editor's Note: The European Union has since succeeded the European Community. However, for purposes of establishing diversity jurisdiction, federal courts consider the identity of the parties at the time the complaint in the case was filed.

conclude that it satisfied the definition of "agency or instrumentality of a foreign state" in the FSIA. Excerpts from the opinion of the Court of Appeals follow (with footnotes omitted).

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Section 1332(a)(4) grants the federal courts jurisdiction over suits where the amount in controversy exceeds $75,000 and the suit is between "a foreign state ... as plaintiff and citizens of a State." 28 U.S.C. § 1332(a)(4). A "foreign state" is defined for purposes of § 1332(a)(4) by § 1603, which is part of the Foreign Sovereign Immunities Act ("FSIA"). This latter section provides:

> (a) A "foreign state" ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
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> (1) which is a separate legal person, corporate or otherwise, and
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> (2) which is an organ of a foreign state or political subdivision thereof
>
> ...
>
> and
>
> (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

Id. § 1603.

The European Community is therefore a "foreign state" for purposes of § 1332(a)(4) if it is an "agency or instrumentality of a foreign state." Whether it is an agency or instrumentality of a foreign state, in turn, depends on whether it conforms to the definition in subsection (b). There is no doubt that the European Community satisfies the first and third elements of the definition of "agency or instrumentality" provided in § 1603(b). It is clear also that the European Community is not a political subdivision of a foreign state. The question is whether the European Community is "an organ of a foreign state." *Id.*

For the reasons discussed below, we conclude that the European Community is an organ of a foreign state, and thus an agency or instrumentality of a foreign state. As a result, the continued participation of the European Community in this suit does not destroy complete diversity.

A. Definitions

The FSIA does not include a definition of the term "organ." A number of dictionaries we have consulted include definitions of "organ" that are altogether compatible with the European Community in its relationship to the states that formed it. ...RJR in rebuttal points to definitions that characterize an organ as subordinate to a larger entity, arguing that this is not the case with the European Community's relationship to its member nations. But the fact that the word is sometimes used to refer to a smaller part of a larger whole does not mean that the word can serve only in that fashion. The European Community was formed by its member nations to serve on their collective behalf as a body exercising governmental functions over their collective territories. We see no reason why it is not properly described as an organ of each nation.

In *Filler v. Hanvit Bank,* 378 F.3d 213, 217 (2d Cir.2004), this court set forth five factors to guide a court in determining whether a party is an "organ" under the FSIA. The factors are:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d 841, 846–47 (5th Cir.2000)) (alteration in original). We have stated that these factors invite a balancing process, and that an entity can be an organ even if not all of the factors are satisfied. *See In re Terrorist Attacks on Sept. 11, 2001,* 538 F.3d 71, 85 (2d Cir.2008), *abrogated on other grounds by Samantar v. Yousuf,* 560 U.S. 305, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010). The European Community satisfies four of these factors and, very likely, also the fifth: it was created by the European nations for national purposes; it is supervised by the foreign countries; it has public employees whose salaries are paid, at least indirectly, by the member nations, which continue to bear collectively the expenses of operation; it holds exclusive rights in the foreign countries; and the foreign countries treat it as a government entity under their laws. We discuss each of these factors briefly below.

1. National Purpose

It seems beyond doubt that the member states that founded the European Community did so for a "national purpose." *Filler,* 378 F.3d at 217. Their purpose was to establish governmental control on a collective basis over various national functions previously performed by each of the member states on an individual basis, such as by establishing a common market and a monetary union, and by coordinating economic activities throughout the community. EC Treaty, arts. 1–4. The management of a common currency and the maintenance of economic stability are quintessential national purposes.

2. Supervision

We have said that a foreign state actively supervises an organ when it appoints the organ's key officials and regulates some of the activities the organ can undertake. *See, e.g., Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.*, 476 F.3d 140, 143 (2d Cir.2007). Member states exercise supervisory responsibility over the European Community by appointing representatives to serve on the Council of Ministers, which is the European Community's "primary policy-making and legislative body." *See* Stephen Breyer, *Changing Relationships Among European Constitutional Courts,* 21 Cardozo L.Rev. 1045, 1046 (2000). Each member of the Council is the appointed representative of one member state (although the individual representative will change depending on the subject matter to be discussed by the Council). *Id.* Additionally, each member state selects commissioners to serve on the European Commission, which administers the Community's various departments. *Id.* at 1046–47.

It is true that these entities are just two of the five basic institutions of the European Community. However, this factor does not require the foreign state to micro-manage every aspect of the organ's activities. The Council of Ministers is the European Community's primary policy-making and legislative body. Therefore, the member states' supervision of this entity enables the member states to supervise the most significant policy decisions made by the European Community.

3. Public Employees

The third factor asks "whether the foreign state requires the hiring of public employees and pays their salaries." *Filler,* 378 F.3d at 217. The EC Treaty, enacted by the member states, requires the creation of particular positions, which are to be filled by public officials. *See European Cmty. II,* 814 F.Supp.2d at 205. Service as a European Community official satisfies the European Court of Justice's definition of "public service" because such officials exercise "powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities." *Id.* (quoting Case 149/79, *Comm'n of the European Cmtys. v. Kingdom of Belgium,* 1980 E.C.R. 3881, ¶ 10). The member states indirectly pay the salaries of the public employees. In 2000, for example, they contributed 78.4% of the European Community's budget, 5.5% of which goes to administrative expenses, which include salaries and pensions. *See* European Commission, EU Budget 2008 Financial Report, 82, 88 (2009).

RJR argues that the European Community does not satisfy this factor because its employees are not public employees *of the member states. See, e.g., Patrickson v. Dole Food Co.,* 251 F.3d 795, 808 (9th Cir.2001), *aff'd by* 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). This fact seems to us of small importance at best. Given that the European Community exercises governmental functions delegated to it by the member states, and does so through public employees whose pay is financed largely by the member states, it seems to make little or no difference for the question whether the European Community serves as an organ of its member states that its employees are not employees directly of the member states. Nevertheless, as noted above, our precedent makes clear that the five *Filler* factors are merely issues to be considered in the decision, and there is no requirement that all five be satisfied to support the conclusion that an entity is an organ of a foreign state. We would reach the same conclusion even if precedent compelled us to decide that the European Community fails to satisfy this factor. *See Peninsula Asset Mgmt.,* 476 F.3d at 143 (concluding the entity was an "organ" despite the fact that it failed to satisfy the public employee factor).

4. Exclusive Rights

Fourth, we consider "whether the entity holds exclusive rights to some right in the foreign country." *Filler,* 378 F.3d at 217 (alteration omitted). This factor has been given a broad meaning. *See, e.g., Terrorist Attacks,* 538 F.3d at 86 (an entity satisfied this factor when it held "the 'sole authority' to collect and distribute charity to Bosnia"); *Peninsula Asset Mgmt.,* 476 F.3d at 143 (entity "has the exclusive right to receive monthly business reports from the solvent financial institutions it oversees"). The European Community holds the exclusive right to exercise a number of significant governmental powers, which include the right to "authori[z]e the issue of banknotes within the Community" and "to conclude the Multilateral Agreements on Trade in Goods." *European Cmty.,* 814 F.Supp.2d at 206–07.

5. Foreign State Law

Finally, the fifth factor asks "how the entity is treated under foreign state law." *Filler,* 378 F.3d at 217. In *Peninsula Asset Management,* this factor was satisfied when the "Korean government informed the State Department and the district court that it treats [the entity] as a government entity." *Peninsula Asset Mgmt.,* 476 F.3d at 143. Neither party cites to European law that clearly addresses this question. The member states that are parties to this suit have identified the European Community as an organ. Plaintiffs informed the district court in their briefing that they consider the European Community to be a governmental entity, and the United States Department of State has advised that it accepts this representation. *See* Brief for the United States as Amicus Curiae at 29. Therefore, in a manner similar to the one employed in *Peninsula Asset*

Management, the European Community appears to satisfy this factor. Furthermore, the fact that the member states have ceded portions of their governmental authority to the European Community to be exercised by it in their stead and on their collective behalf seems to confirm its status as an organ and agency of the member states.

RJR argues that none of the member states has treated the European Community as its "organ," rather than as a supranational body of the member states. This argument, however, depends on the proposition that a governmental entity created by a collectivity of governments to exercise certain powers in their stead and on their behalf cannot be at once a supranational entity and an organ or agency of the actors that created it. It appears to us that both descriptions are accurate, and the fact that the European Community functions as a supranational governmental entity does not negate its also being an organ and agency of its member states, which continue to exist as sovereign nations, notwithstanding having delegated some of their governmental powers to the supranational agency they created.

B. Multi–National Entities

RJR argues that the text and legislative history of the FSIA, along with the common law at the time of the FSIA's enactment, demonstrate that an "organ" of a foreign state cannot include an international organization created by multiple states. We disagree.

* * * *

2. Exceptions to Immunity from Jurisdiction: Commercial Activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

In December 2014, the United States government filed a brief in response to the Supreme Court's request for its views on a petition for certiorari filed by Austria's state-owned railway in a case involving the interpretation of section 1605(a)(2). *OBB Personenverkehr AG v. Carol P. Sachs*, No. 13-1067. Respondent in the Supreme Court (plaintiff in the district court), Sachs, had sued the railway in federal court in California after sustaining injuries while boarding an OBB train in Austria. She had purchased her Eurail pass in the United States via a travel agency ("RPE"). The district court in California dismissed the case for lack of jurisdiction under the FSIA's commercial activity exception and a panel of the Court of Appeals for the Ninth Circuit affirmed. However, the Ninth Circuit granted rehearing en banc and reversed. Petitioner challenged the Court of Appeals' conclusions that (1) common-law agency principles may be used to attribute an entity's actions to a foreign state for purposes of the FSIA's commercial activity exception; and (2) Respondent's claims are "based upon" commercial activity – *i.e.*, the sale of the Eurail pass in the United States.

The U.S. brief explains that the Court of Appeals' had correctly held that the commercial activity exception encompasses situations in which a foreign state carries on commerce through the acts of an independent agent in the United States, and that this ruling does not conflict with any decisions of the Supreme Court or other courts of appeals. With respect to the second question, the U.S. brief asserts the position that the Court used an overly permissive formulation of the "based upon" standard, but that further review was not warranted because the lack of clarity about the precise nature of Respondent's claims would make it difficult for the Court to provide guidance on the content of the "based upon" requirement by applying it to the claims in the case. In addition, the U.S. brief notes that the district court on remand may dismiss the case on other grounds, and that cases presenting similar claims are unlikely to recur with any frequency, in light of the prevalence of forum-selection clauses in form ticket contracts for travel.

Excerpts follow (with footnotes and citations to the record omitted) from the U.S. brief recommending the Supreme Court deny the petition for certiorari.[**]

* * * *

I. THE COURT OF APPEALS' HOLDING THAT A FOREIGN STATE MAY CARRY ON COMMERCIAL ACTIVITY IN THE UNITED STATES THROUGH THE ACTS OF AN AGENT ACTING ON ITS BEHALF DOES NOT WARRANT REVIEW

The court of appeals correctly held that a foreign state may be found to have "carried on" commercial activities in the United States when it has employed an entity to act as its agent in conducting those activities. That holding does not conflict with any decision of this Court or another court of appeals.

A. 1. The FSIA's commercial activity exception provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(e) (defining the latter phrase as commercial activity "carried on by such state and having substantial contact with the United States"). The FSIA does not further explain what it means for commercial activity to be "carried on" by a foreign state. Applying traditional agency law principles to give content to that phrase best furthers Congress's intent in enacting the exception.

The commercial activity exception is designed to ensure that when a foreign state acts as an "every day participant[]" in the marketplace—in other words, when the state engages in commercial ventures of the sort that private parties undertake—plaintiffs may seek judicial resolution of any resulting "ordinary legal disputes." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976) (House Report); id. at 17 (examples of disputes that would fall within the exception include "business torts occurring in the United States").

[**] Editor's Note: On January 23, 2015, the petition for certiorari was granted. On April 24, 2015, the United States filed an amicus brief in support of reversal of the Ninth Circuit's decision.

Private parties often engage in commercial activities with the assistance of agents whose conduct they direct and control. As a result, common-law agency principles are routinely applied in private commercial disputes: for purposes of both jurisdiction and liability, agency principles may provide a basis for attributing the conduct of one party to a principal who directed the activity at issue. See Restatement (Third) of Agency § 1.01 cmt. c (2006); *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (acts of agent may be imputed to principal for purposes of exercising specific jurisdiction).

Congress therefore would have expected traditional agency-law principles to play a similar role in determining when a foreign state has undertaken commercial activities that subject it to suit. Foreign states, like private actors, may often engage in commercial activities by employing entities under their direction and control to enter into and execute transactions. See *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983). When a foreign state uses agents to accomplish its commercial ends, the state is acting as an "every day participant[]" in the marketplace. House Report 7. And by virtue of the state's direction and control over the agent, the state is effectively taking actions in the United States commercial market itself. Applying agency-law principles to determine when a foreign state has "carried on" commercial activity therefore furthers Congress's purpose of ensuring that foreign states may be subject to suit when they act in a commercial manner. See *Maritime Int'l*, 693 F.2d at 1105; see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 372-373 (1993) (Kennedy, J., concurring in part and dissenting in part) (actions of private entity acting as agent of Kingdom of Saudi Arabia could be attributed to Kingdom); U.S. Amicus Br. at 14 n.8, *Nelson*, supra (No. 91-522).

Exercising jurisdiction over a foreign state that has "carried on" commercial activity through an agent is also consistent with international practice. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, a draft convention describing well-accepted state practice in this respect, provides that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is *in fact acting on the instructions of, or under the direction or control of, that State* in carrying out the conduct." G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83, at 3 (Jan. 28, 2002) (emphasis added). The United States expressed support for an earlier, materially similar draft article. State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998).

* * * *

II. THE COURT OF APPEALS' HOLDING THAT RESPONDENT'S CLAIMS ARE "BASED UPON" PETITIONER'S COMMERCIAL ACTIVITY IN THE UNITED STATES DOES NOT WARRANT REVIEW

Petitioner also challenges the court of appeals' conclusion that respondent's claims are "based upon" petitioner's commercial activity in the United States. Although the court applied an overly permissive formulation of the "based upon" requirement, this case would not be a suitable vehicle to provide guidance on the correct application of that requirement.

A. 1. In order to establish jurisdiction over a foreign state under the relevant clause of Section 1605(a)(2), a plaintiff must show that "the action is based upon" the state's commercial activity in the United States. In *Nelson*, this Court held that the phrase "based upon" connotes "conduct that forms the 'basis,' or 'foundation,' for a claim." 507 U.S. at 357. The Court

explained that the phrase "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case," and it cited with approval a decision describing the inquiry as focusing on "the gravamen of the complaint." *Ibid*. (quoting *Callejo v. Bancomer*, S.A., 764 F.2d 1101, 1109 (5th Cir. 1985)). The Court also cautioned that it "d[id] not mean to suggest that the first clause of [Section] 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state." *Id*. at 358 n.4. The Court concluded that Nelson's claims challenging his torture and imprisonment during his employment in Saudi Arabia were not based upon his recruitment and hiring in the United States. Those commercial activities, the Court stated, "preceded the[] commission" of the intentional torts Nelson alleged. *Id*. at 358.

2. In this case, the court of appeals stated that a claim is "based upon" commercial activity under *Nelson* if "an element of [the plaintiff's] claim consists in conduct that occurred in commercial activity carried on in the United States," or if such activity is an "essential fact" to proving an element of the claim. That understanding of the "based upon" requirement is problematic. As this Court indicated in *Nelson*, the commercial activity must be the "gravamen"—the essence or gist—of the plaintiff's claim, not simply a link in the chain of events that led to an overseas injury. 507 U.S. at 357; accord U.S. Amicus Br. at 10, *Nelson*, *supra* (No. 91-522). Congress's inclusion of the "based upon" language provides a significant limitation on the jurisdiction of courts in cases brought under Section 1605(a)(2) by requiring an appropriate connection between the claims at issue and the foreign state's commercial activities in the United States. There may be situations in which the commercial activity establishes a single element of, or fact necessary to, a claim, and that element is so central to the claim that the commercial activity may be said to be the gravamen of the claim. But a court might apply the single-element formulation in a manner that permits the "based upon" requirement to be satisfied simply because the commercial activity is relevant to an element or factual predicate of the plaintiff's claim that has little to do with the core wrong the plaintiff has allegedly suffered. That could lead the court to assert jurisdiction in a case that does not have a substantial connection to the foreign state's commercial activity in the United States.

The court of appeals' application of the single-element standard in this case also appears to have been unduly permissive. The court focused on whether the ticket sale in the United States established a fact necessary to an element of each of respondent's claims. The court concluded that respondent's claims were "based upon" the sale of the Eurail pass because, under California law, that sale was necessary to (1) establish a heightened duty of care for petitioner as a common carrier for purposes of respondent's negligence claim, and (2) to establish the existence of a transaction between seller and consumer for purposes of respondent's strict-liability and breach-of-implied-warranty claims. *Id*. at 34-40. It is doubtful that the sale of a rail pass in the United States should be considered the gravamen of respondent's claims, as those claims focus on the events in Austria that caused respondent's injury there.

* * * *

B. As petitioner observes, the Second Circuit has used a different formulation than the Ninth Circuit to describe the "based upon" requirement. The Second Circuit has emphasized that a claim "based upon" commercial activity requires a "significant nexus" between the activity and the gravamen of the complaint that exceeds but-for causation. *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 155 (2007) (emphasis omitted) (holding that plaintiff's claim was not based upon

shipments in United States because they were not the core of the alleged conspiracy); see *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp*., 204 F.3d 384, 390 (2d Cir. 2000), cert. denied, 532 U.S. 904 (2001). Other courts, however, have used a single-element formulation similar to that employed by the Ninth Circuit. See *Kirkham v. Société Air France*, 429 F.3d 288, 292-293 (D.C. Cir. 2005) (under single-element formulation, claims for injuries suffered in French airport were "based upon" ticket sale in United States); *BP Chems. Ltd. v. Jiangsu Sopo Corp*., 285 F.3d 677, 682 (8th Cir.) ("only one element of a plaintiff's claim must concern commercial activity"), cert. denied, 537 U.S. 942 (2002).

The extent to which those different formulations reflect substantive disagreements as to the content of the "based upon" requirement is unclear, however, because each case concerns distinct claims and varying degrees of connection between the commercial activity and one or more elements of the plaintiff's claims. …

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3. Service of Process and Attempt to Compel Foreign Sovereign to Intervene

The United States filed an *amicus* brief in a state appellate court in New York on August 21, 2014 in a case arising out of the long-running efforts of a class of victims of human rights violations by the regime of former President Ferdinand Marcos of the Philippines to collect a judgment against the Marcos estate. *Swezey v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.,* No. 155600/13 (N.Y. App. Div. 1st Dep't.). The class has been seeking to satisfy their judgment against the Marcos estate by levying on certain assets that have also been the subject of forfeiture proceedings in the Philippines courts. In 2008, the U.S. Supreme Court determined that an interpleader action brought in federal court seeking to resolve competing claims to the assets had to be dismissed because the Republic of the Philippines was immune and the action could not proceed in its absence. *Republic of the Philippines v. Pimentel* , 553 U.S. 851 (2008). See *Digest 2008* at 475-81.

Following the Supreme Court's decision, the class initiated a state court action in New York seeking turnover of the funds. In June 2012, the New York Court of Appeals required that action to be dismissed, ruling that the fact that the Philippine government could not be joined without its consent required dismissal. In June 2013, the class filed another state court turnover proceeding. Initially, the trial courts in New York stayed the action to allow proceedings relating to the assets in the courts of the Philippines to conclude. However, in 2014, the state trial court lifted the stay. Excerpts below (with footnotes omitted) from the 2014 U.S. *amicus* brief address the trial court's order directing service of process and seeking to compel the Republic to intervene in the litigation. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*. After the U.S. filed its brief, the appellate court reversed the trial court's order and reimposed the stay.

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The trial court's order should be vacated, and this case should be remanded with instructions to dismiss the petition. As a threshold matter, the method of service ordered by the trial court was inadequate to obtain personal jurisdiction over the Republic, and is inconsistent with both the FSIA and the United States' international obligations. To the extent the trial court intended to compel the Republic to appear, furthermore, it was without the power to do so.

Nor was the trial court correct to order that the action could proceed in the Republic's absence. As the U.S. Supreme Court, this Court, and the New York Court of Appeals have all recognized, the Republic's invocation of sovereign immunity to decline to be joined is entitled to substantial weight, and dismissal is the only remedy that will protect the interests at stake. *Pimentel*, 553 U.S. at 873; *Swezey II*, 19 N.Y.3d at 555; *Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 87 A.D.3d 119, 123 (N.Y. App. Div. 1st Dep't 2011) (Swezey I). The factual developments since those prior decisions do not materially affect the equitable balancing, or undermine the conclusion that dismissal is warranted.

A. Service on the Republic Was Improper, and the Trial Court Erred to the Extent It Sought to Compel the Republic's Appearance.

1. As noted, the trial court directed petitioner's counsel to serve its order on the Republic at the Republic's Embassy and one of its consulates in the United States. This method of service was improper for two reasons: it fails to comport with the FSIA and is inconsistent with the United States' international treaty obligations.

First, Section 1608(a) of the FSIA governs service on a foreign state in state and federal courts in the United States, and it sets out four exclusive procedures for effecting service on a foreign state. See 28 U.S.C. § 1608(a). None of the available methods of service includes service by mailing papers to a consulate or embassy, and none of the procedures set forth in Section 1608(a) appears to have been followed in this case. Plaintiffs' counsel indicated at the hearing that the Republic already had notice of these proceedings, pointing to the fact that the Republic's urgent motion for entry of judgment filed with the Philippine Supreme Court referenced the New York action. … However, numerous courts have recognized that, when serving a foreign state, actual notice is insufficient; instead, strict compliance with Section 1608(a) is required. See *Magness*, 247 F.3d at 615-616; *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir.1983); *Gray*, 443 F. Supp. at 820-821.

Although Section 1608's provisions refer to service of documents that initiate litigation or enter default judgment against a foreign state, 28 U.S.C. § 1608(a), (e), Section 1608 provides a model for what constitutes adequate service on a foreign state. The same procedures should apply by analogy where a plaintiff requests a court order seizing assets over which the foreign state claims ownership, and where the state has not previously been a party to the action. The order at issue here is analogous to service of an initial summons and complaint, because it is an effort to assert jurisdiction over the state or to adjudicate the state's rights in its absence, before the state has received any formal notice of the suit. It is critical that a foreign state have proper notice of such an action where, by definition, the foreign state may have rights at stake in the dispute and/or could be inequitably affected by a judgment. See CPLR 1001(a) (defining necessary parties as persons "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action").

Second, the particular service method ordered here by the trial court and attempted by petitioners—delivery on the Philippine Embassy and a consulate—is inconsistent with international treaty obligations of the United States. This defect in service provides an independent basis for vacating the order, and also illustrates why Section 1608 should be read broadly to respect Congress's attempt to standardize the methods by which sovereigns are alerted to pending litigation.

Under Article 22 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 (entered into force with respect to the United States Dec. 13, 1972), the premises of a diplomatic mission are inviolable, and a court order requiring service of legal documents upon an embassy is contrary to this inviolability. See *Autotech Techs. LP v. Integral Research & Dev. Corp*., 499 F.3d 737, 748-49 (7th Cir. 2007) ("[S]ervice through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law. The Vienna Convention on Diplomatic Relations * * * prohibits service on a diplomatic officer." (citing *Tachiona v. United States*, 386 F.3d 205, 222 (2d Cir. 2004))). Section 1608(a) was enacted specifically to "preclude" private litigants from serving a foreign state by "mailing [] a copy of the summons and complaint to [its] diplomatic mission," in order to "avoid questions of inconsistency" with the Convention's definition of the physical inviolability" of foreign missions. H.R. Rep. No. 94-1487, at 26.

Similarly, under Article 31 of the Vienna Convention on Consular Relations, consular premises are inviolable. *Vienna Convention on Consular Relations*, art. 31, Apr. 24, 1963, 21 U.S.T. 77 (entered into force with respect to the United States Dec. 13, 1972). Service on consular premises is a violation of consular inviolability, and is prohibited under the Convention. See *Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012); Restatement (Third) of Foreign Relations Law § 466, note 2 (1987); State Dep't Mem. & Letter, Digest of U.S. Practice in International Law 204-206 (1976).

Efforts to serve a foreign state at its embassy or consulate can cause significant friction in our foreign relations. In analogous circumstances, the United States routinely objects to attempts by private parties or foreign courts to serve U.S. diplomatic missions or consulates overseas with any type of order directing the United States to respond or appear in litigation, insisting that service occur through diplomatic channels absent an applicable international agreement providing otherwise. The service ordered by the trial court here was unlawful, and accordingly was not effective and failed to give the court personal jurisdiction over the Republic.

2. The trial court's order provided the Republic of the Philippines with 60 days from the filing of proof of service to intervene in this action and to respond to the turnover petition. Although the court's intent is not entirely clear, it is possible that the court believed it could compel the Republic to appear in the action and that it was empowered to adjudicate the Republic's rights, particularly given its recent comments that "[t]he Philippine government has not cooperated with us. It has not moved here. It has not appeared." [Doc. No. 83] (Tr. of Mot. Proc., May 8, 2014, at 6). The court lacked authority to take such action.

As the New York Court of Appeals made clear, "principles of sovereign immunity require the Republic's consent before a New York court may exercise jurisdiction over it." *Swezey II*, 19 N.Y.3d at 552. As noted earlier, the FSIA sets out the exclusive means by which a U.S. court can obtain jurisdiction over a foreign state in a civil case, and provides that foreign states are immune from jurisdiction except in the narrow circumstances set forth in the statute. The Philippines has not waived its immunity for purposes of this action, nor have the petitioners (or the trial court) sought to establish that an exception to immunity under the FSIA applies here.

Given the absence of an applicable exception in this case, it is settled that the Republic cannot be compelled to participate nor be bound by any order issued in its absence. *Id*. at 553-554; accord *Pimentel*, 553 U.S. at 865, 870 (recognizing that any order of the trial court could not bind the Republic).

To the extent the trial court here purported to disregard this precedent and exercise authority to require the Republic to appear, or to legally bind the Republic, the court erred.

B. This Action Should Have Been Dismissed in the Absence of the Republic.

The trial court also erred in refusing to dismiss this action and in ordering the action to proceed to adjudicate plaintiffs' claim to the account, even in the Republic's absence. …. The U.S. Supreme Court, this Court, and the New York Court of Appeals have all held in virtually identical circumstances that the inability to join the Republic as a necessary party requires dismissal. No material change has occurred since those rulings that would tip the equitable balancing, or alter the conclusion that dismissal is necessary in light of the Republic's invocation of sovereign immunity. Indeed, to the extent subsequent factual developments have any relevance, they provide additional support for dismissal.

* * * *

4. Execution of Judgments against Foreign States and Other Post-Judgment Actions[***]

a. Attempted execution on diplomatic bank accounts

On October 22, 2014, the United States filed a statement of interest in U.S. district court in Florida to oppose an effort by a plaintiff to satisfy a default judgment against Venezuela by garnishing all of Venezuela's diplomatic, consular, and UN and OAS mission bank accounts. *Devengoechea v. Venezuela*, No. 12-23743 (S.D. Fla.). The U.S. statement of interest is excerpted below (with footnotes omitted) and available at *www.state.gov/s/l/c8183.htm*. The district court magistrate judge's report and recommendation, agreeing with the U.S. statement of interest and recommending that the writs of garnishment be dissolved, which was later adopted by the district court judge, is also available at *www.state.gov/s/l/c8183.htm*.

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[***] Editor's note: In a significant U.S. court decision in 2014 in a case in which the United States did not participate, *Jerez v. Republic of Cuba*, 775 F.3d 419 (D.C. Cir. 2014), the Court of Appeals for the D.C. Circuit held that a default judgment obtained in state court against the Cuban government could not be enforced because the state court lacked a basis for jurisdiction under the FSIA to enter the default judgment. The state court had failed to consider whether jurisdiction existed under the FSIA, finding jurisdiction under the Alien Tort Claims Act. In subsequent federal enforcement proceedings seeking to attach property of alleged agencies and instrumentalities of Cuba, the U.S. District Court for the District of Columbia decided to vacate a writ of attachment, finding no jurisdiction for the underlying judgment under the FSIA. On appeal, Jerez identified the non-commercial tort exception, 28 U.S.C. § 1605(a)(5), and the terrorism exception, at the relevant time, 28 U.S.C. § 1605(a)(7) (2006), as bases for jurisdiction. Considering jurisdiction *de novo*, the D.C. Circuit affirmed, reasoning that the non-commercial tort exception did not apply because the torture Jerez was subjected to took place in Cuba, not the United States. And the court found the terrorism exception inapplicable because his claims did not satisfy the statutory requirement that the state in question was designated a state sponsor of terrorism at the time the alleged act of terrorism occurred or was designated later because of the act of terrorism at issue.

* * * *

A. UNDER INTERNATIONAL AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY, THE BANK ACCOUNTS OF VENEZUELA'S EMBASSY, CONSULATES, U.N. MISSION, AND OAS MISSION ARE IMMUNE FROM ATTACHMENT OR EXECUTION

Applicable treaties, which are binding on federal courts to the same extent as domestic statutes, establish the immunity of the bank accounts of Venezuela's Embassy, consulates, U.N. Mission, and OAS Mission. Although the FSIA serves as the exclusive basis for jurisdiction over foreign states in federal and state courts and also governs the execution of judgment obtained against foreign states, it is well-established that the FSIA does not displace the immunities provided by these treaties. See generally *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Cook v. United States*, 288 U.S. 102, 120 (1933). When it enacted the FSIA, Congress recognized that the United States had existing international legal obligations with respect to theprotection of diplomatic and consular property. Congress therefore provided that the FSIA provisions addressing the immunity from attachment and execution of a foreign state's property were "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. § 1609; see also H.R. Rep. No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610 (noting that the FSIA is "not intended to affect either diplomatic or consular immunity"); *767 Third Avenue Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 298 (2d Cir. 1993) ("Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act.").

At the time the FSIA was enacted, the United States had already entered into several international agreements establishing its obligations to protect the property of diplomatic and consular missions from interference. The Vienna Convention on Diplomatic Relations ("VCDR") and the Vienna Convention on Consular Relations ("VCCR")—to which Venezuela is also a party—obligate the United States to ensure that diplomatic and consular missions are accorded the facilities they require for the performance of their diplomatic and consular functions. Article 25 of the VCDR provides that "the receiving state shall accord full facilities for the performance and functions of the mission." VCDR, art. 25, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. Article 28 of the VCCR similarly provides that "the receiving state shall accord full facilities for the performance of the functions of the consular post." VCCR, art. 28, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820.

With respect to missions to the United Nations ("U.N."), the U.N. Charter provides that "representatives of the Members of the United Nations . . . shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." U.N. Charter, art. 105, para. 2, June 26, 1945, 59 Stat. 1031, T.S. No. 993. In addition, the United States has agreed that representatives to the U.N. "shall . . . be entitled . . . to the same privileges and immunities . . . as [the United States] accords to diplomatic envoys accredited to it." Agreement Between the U.N. and the United States Regarding the Headquarters of the U.N., art. V, § 15, June 26, 1947, T.I.A.S. 1676; see also Convention on the Privileges and Immunities of the U.N., art. IV, § 11(g), Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. 7502 (entered into force with respect to the United States Apr. 29, 1970) (stating that representatives of U.N. members shall enjoy "such . . . privileges, immunities and facilities . . . as diplomatic envoys

enjoy"). Similarly, with respect to missions to the Organization of American States (OAS), the bilateral agreement between the United States and the OAS on privileges and immunities provides that certain diplomatic-level mission members enjoy "the same privileges and immunities in the United States . . . as the United States accords to diplomatic envoys who are accredited to it." Agreement Between the United States and the OAS, art. 1, Mar. 20, 1975, 26 U.S.T. 1026; see also 22 U.S.C. 288g. These agreements ensure that diplomats accredited to the U.N. and OAS, and the permanent missions through which they operate, receive the same protections as diplomats and missions accredited to the United States, including the protections accorded to diplomatic property by the VCDR. See *767 Third Avenue Assocs.*, 988 F.2d at 298 (applying VCDR to define protection afforded to U.N. permanent mission); *Avelar v. J. Cotoia Constr., Inc.*, No. 11-CV-2172 (RRM)(MDG), 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011) (explaining that the VCDR "applies with equal force to missions accredited to the United Nations and the United States, with respect to immunity against execution and levy of mission assets").

Courts have drawn on these international agreements to recognize that bank accounts of diplomatic and consular missions that are used for mission purposes are immune from attachment or execution, because a mission's access to its bank funds in the receiving state is critical to the functioning of a mission. …

In each of the cases … that address the "full facilities" provision, the foreign state submitted a declaration stating that the bank accounts at issue were used for the functioning of the mission. Here too, Venezuela has filed with the Court three signed declarations from high-ranking officials with knowledge of the accounts, attesting that the funds in all of the accounts are used by Venezuela for purposes of its missions and consulates. …. Courts have concluded that such declarations are dispositive in establishing that bank accounts are "official bank accounts used or intended to be used for purposes of the diplomatic mission," and have not ordered discovery to examine the mission's budget and records. *Liberian E. Timber Corp.*, 659 F. Supp. at 608; …Accordingly, the Court should accord the bank accounts of Venezuela's Embassy, consulates, U.N. Mission, and OAS Mission immunity from attachment and execution in furtherance of the United States' international obligations, and vacate the garnishment of such accounts.

Efforts to attach or execute on foreign mission or consular property also implicate important foreign policy interests of the United States. The attachment of or execution on a mission's or consulate's bank accounts may adversely affect the United States' relationships with foreign states. Furthermore, such actions raise reciprocal concerns for the treatment of U.S. missions abroad; the United States vigorously opposes efforts by private parties to attach its diplomatic accounts abroad, including by seeking to enlist the assistance of the government of the receiving state in such cases. See Boos v. Barry, 485 U.S. 312, 323 (1988) (respecting diplomatic immunity "ensures that similar protections will be accorded those that we send abroad to represent the United States"). For these reasons as well, the Court should ensure that the bank accounts of Venezuela's Embassy, consulates, and missions to the U.N. and OAS are accorded the full protections to which they are entitled under international law.

B. A FOREIGN SOVEREIGN'S PROPERTY MAY BE ATTACHED ONLY IN ACCORDANCE WITH THE FSIA

Even if one or more of the bank accounts at issue here were not immune from attachment under the international agreements discussed above, the Court still must ensure compliance with the FSIA's provisions governing the attachment of or execution on a foreign state's property. See, *e.g.*, *Liberian E. Timber Corp.*, 659 F. Supp. at 608-10. Under § 1609, a foreign state's property in the United States is immune from attachment, including garnishment, unless a specific statutory exception to immunity applies. See 28 U.S.C. § 1609; H.R. Rep. 94-1487, at 28 (noting that the "term 'attachment in aid of execution' in the FSIA is intended to include attachments, garnishments, and supplemental proceedings under applicable Federal or State law to obtain satisfaction of a judgment"). Furthermore, § 1610(c) of the FSIA prohibits attachment of or execution on a foreign state's property unless the court has issued an order determining such attachment or execution to be appropriate under the statute after a reasonable period of time following entry of the judgment (including service of a default judgment under 1608(e), where required). See 28 U.S.C. § 1610(c); H.R. Rep. 94-1487, at 30 …. A court must find an exception to immunity to permit attachment even if the foreign government does not appear; and the judgment creditor bears the burden of identifying the particular property to be executed against and proving that it falls within a statutory exception to immunity from execution. See, e.g., *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 293-94, 297 (2d Cir. 2011); *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 796, 799, 801 (7th Cir. 2011) (explaining that courts are required "to determine—sua sponte if necessary—whether an exception to immunity applies," a determination that must be made "regardless of whether the foreign state appears"); *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) ("[C]ourts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution sua sponte."); *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004).

The writ of garnishment at issue here (ECF No. 31) was signed by the clerk of court on plaintiff's motion; it was not issued pursuant to a court order determining that Bank of America held property subject to attachment under the FSIA. Because the procedural requirements of the FSIA were not satisfied, the writ of garnishment should be vacated. …

* * * *

b. Restrictions on the Attachment of Property under the FSIA and TRIA

(1) Rubin v. Iran

Plaintiffs in *Rubin v. Iran* hold a judgment against Iran arising out of Iran's role in a 1997 terrorist attack and sought to attach various artifacts in the possession of Chicago museums, including the Chogha Mish collection, which is the subject of a dispute between Iran and the United States before the Iran-U.S. Claims Tribunal. The United States filed a statement of interest in the case in the district court on February 19, 2014, which is available at *www.state.gov/s/l/c8183.htm*. The district court granted motions for summary judgment by Iran and the Chicago museums, holding that the artifacts

were immune from attachment under the FSIA, and that the artifacts were not blocked assets under the Terrorism Risk Insurance Act of 2002 ("TRIA"), P.L. No. 107-297, 116 Stat. 2322 (28 U.S.C. § 1610 note). Plaintiffs appealed to the U.S. Court of Appeals for the Seventh Circuit. The United States filed a brief as *amicus curiae* on November 3, 2014 in support of affirming the decision of the district court. Previous proceedings in this case are discussed in *Digest 2012* at 307-09 (discussing the U.S. brief in the Supreme Court on petition for certiorari); *Digest 2011* at 318-21 (excerpting the previous decision of the Court of Appeals for the Seventh Circuit; *Rubin v. Islamic Republic of Iran,* 637 F.3d. 783 (7th Cir. 2011)); *Digest 2009* at 352-53, 361-62 (excerpting the previous brief of the United States in the Seventh Circuit). Excerpts follow from the 2014 *amicus* brief of the United States (with footnotes omitted). The full text of the U.S. brief filed in the Seventh Circuit in 2014 is available at www.state.gov/s/l/c8183.htm.

* * * *

I. 28 U.S.C. § 1610(a) Provides An Immunity Exception Only For Properties That The Foreign State Itself Used In Commercial Activity

In 28 U.S.C. § 1610(a), the FSIA permits attachment of "[t]he property in the United States of a foreign state, . . . used for a commercial activity in the United States," in certain circumstances. The text of Section 1610(a) does not explicitly state whether the "use[]" of the property for a commercial activity must be by the foreign state, or if it can be by a third party. But as the district court correctly recognized, when Section 1610(a)'s text is read in conjunction with the rest of the FSIA, and in light of the FSIA's purpose and history, it becomes clear that only the commercial activity of the foreign state itself suffices.

In 28 U.S.C. § 1602, Congress codified its "[f]indings and declaration of purpose" upon enacting the FSIA. That statutory section reflects that, in enacting the statute, Congress sought to conform to its understanding of immunity in international law, under which "states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities." *Id.* (emphases added). Congress's repeated statutory references to "their" indicate that Congress intended that foreign sovereigns would be taking the actions that would abrogate immunity.

This understanding is consistent with the "restrictive theory" of sovereign immunity, which the FSIA has generally been understood to codify. See *Republic of Austria v. Altmann*, 541 U.S. 677, 690-91 (2004). Under that theory, a sovereign enjoys immunity for its sovereign or public acts, but not with regard to private acts like commercial activity. The theory is partially based on the idea that "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-04 (1976) (plurality opinion) …. When it is a third party that has engaged in the commercial acts, and the foreign government has not had such dealings, that logic ceases to hold. As a result Section 1610(a) should be read as reaching only property that is used by the foreign state itself for commercial activity; third-party acts are irrelevant. …

Plaintiffs' interpretation would also lead to anomalous results contrary to the statutory scheme. As the Fifth Circuit has recognized, if the question were merely whether any entity had ever used the property in commercial activity, virtually all property of a foreign state would qualify since most property (whatever its current use by the foreign state) is purchased from private parties who "used" that property in a commercial transaction when they sold it to the foreign state in the first place. See *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002). Accord *Aurelius Capital Partners LP v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009) (recognizing that the commercial activities of companies that managed a foreign state's assets were irrelevant under the FSIA). It is highly unlikely that Congress intended such a result.

Limiting Section 1610(a) to property used for a commercial activity by the foreign state itself is also consistent with the relationship between the FSIA's execution provisions and its jurisdictional provisions. The latter immunity exceptions allow suit where, inter alia, the action is "based upon a commercial activity carried on . . . by the foreign state," or certain acts "in connection with a commercial activity of a foreign state." 28 U.S.C. 1605(a)(2). With that in mind, it is important that Congress, starting from a baseline barrier of absolute executional immunity, envisioned at the time of the FSIA's enactment that it was "partially lowering" that barrier so that the attachment immunity set out in Section 1610(a) would "conform more closely" to the jurisdictional immunity provisions in Section 1605(a). See H.R. Rep. No. 94-1487, at 27 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6626. Yet because judicial seizure of a foreign state's property was considered a drastic affront to a foreign state's sovereignty at the time the FSIA was enacted, the exceptions to executional immunity are narrower than, and independent from, the exceptions to jurisdictional immunity. See *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014); *Rubin*, 637 F.3d at 796; *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984). Plaintiffs' argument would reverse that well-established rule—it would mean that commercial activity by a third party, which would not support subject matter jurisdiction for purposes of suing a foreign state under § 1605(a)(2), would nevertheless strip the immunity of foreign state property under § 1610(a).

* * * *

II. Section 1610(g) Only Reaches Foreign State Property Used In Commercial Activity

As an alternative argument, plaintiffs contend that they can pursue their attachment under Section 1610(g), even if Iran's property was not used for commercial activity in the United States. Rubin Br. 48-54. The district court correctly rejected plaintiffs' argument.

Under the FSIA's baseline rule, "the property in the United States of a foreign state [is] immune from attachment . . . except as provided" elsewhere in the FSIA. 28 U.S.C. § 1609. Section 1610 goes on to permit attachment in various circumstances, including the one set out in 28 U.S.C. § 1610(a)(7) that plaintiffs have invoked as individuals who hold a terrorism-related judgment and who are pursuing foreign state property. But when dealing with foreign state property, Section 1610 only authorizes attachment when the foreign state's property is used for a "commercial activity in the United States." *Id.* § 1610(a); *see also id.* § 1610(b) (imposing a "commercial activity" requirement with regard to agency or instrumentality property); *NML Capital*, 134 S.Ct. at 2256.

That "commercial activity" restriction is important, because the plain text of Section 1610(g) indicates that specified property is "subject to attachment . . . *as provided in this section*." 28 U.S.C. § 1610(g)(1) (emphasis added). The referenced "section" is Section 1610, and thus Section 1610(g) incorporates by reference the other requirements for attaching foreign state property provided under Section 1610.

Plaintiffs make no attempt to address the crucial "as provided in this section" language. And the cases they cite, some of which entirely ignore the relationship between Section 1610(g) and other subsections, or address the issue only in dicta, make this similar error. *See, e.g.*, *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010) (dicta, and no discussion of "commercial activity"); *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 25-26 (D.D.C. 2011) (no discussion whether Section 1610(g) abrogates "commercial activity" requirements). Indeed, in the Southern District of California case plaintiffs cite, *Ministry of Defense v. Cubic Defense Systems*, 984 F. Supp. 2d 1070 (2013), which is currently on appeal to the Ninth Circuit, the United States has filed an *amicus* brief explaining that the district court misinterpreted Section 1610(g) because it ignored the "as provided in this section" language. Br. For the United States As Amicus Curiae, *Ministry of Defense v. Frym*, No. 13-57182 (9th Cir.) (filed July 3, 2014), at 27-32.

Plaintiffs' reading also would render portions of Section 1610 superfluous, contrary to the "cardinal principle of statutory construction" that a statute should be construed to avoid superfluity. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). Both Sections 1610(a)(7) and (b)(3), which concern terrorism-related judgments entered under 28 U.S.C. § 1605A, require some relation to commercial activity on the part of the foreign state's property, or by the foreign state agency or instrumentality, as a condition of attachment of property in aid of execution. But if Section 1610(g), which also relates to a judgment under Section 1605A, had no such requirement, plaintiffs' view would render the restrictions in Section 1610(a)(7) and (b)(3) superfluous. That cannot be correct.

Despite all of the above, plaintiffs see significance in the fact that Section 1610(g) allows attachment "regardless of" five listed factors. 28 U.S.C. § 1610(g)(1)(A)-(E); *see also* Rubin Br. 51-53. But as this Court has already recognized, *see Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014), that aspect of the statute merely demonstrates that Section 1610(g) was written to override the multi-factor test created in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), for determining when a creditor can look to the assets of a separate juridical entity (like a state-owned bank engaged in commercial activity) to satisfy a claim against a foreign sovereign. *See id.* at 628-34. Indeed, the five factors listed in the statute paraphrase almost perfectly the so-called *Bancec* factors that courts had sometimes applied to determine if such assets are attachable. *See Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). Accordingly, those five factors merely clarify that Iran's judgment creditors can reach properties owned by Iran's agencies and instrumentalities, even if those properties are not directly owned by Iran itself.

* * * *

(2) Ministry of Defense v. Frym et al. (“*Cubic”)*

On July 3, 2014, the United States filed a brief as *amicus*, in the U.S. Court of Appeals for the Ninth Circuit, in support of affirming a U.S. district court’s decision allowing plaintiffs who had obtained a judgment against Iran to attach another district court’s confirmation of arbitral award against Cubic Defense Systems Inc. (“Cubic”) that had been obtained by the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran (“Ministry of Defense”). *Ministry of Defense v. Frym at al.*, No. 13-57182 (9th Cir.). For a discussion of prior proceedings and U.S. briefs in this case (in particular, the U.S. Supreme Court’s decision in *Ministry of Defense v. Elahi*), see *Digest 2009* at 341-48. The United States makes three arguments in its brief, which is excerpted below (with most footnotes omitted): (1) the attachment does not violate the Algiers Accords; (2) the confirmed arbitral award is a “blocked” asset; (3) section 1610(g) of the FSIA does not allow assets to be attached unless they are used in commercial activity. The U.S. *amicus* brief is available in full at www.state.gov/s/l/c8183.htm.

* * * *

I. Allowing Attachment Would Be Consistent With The Algiers Accords

Repeating an argument that Iran has made in a pending dispute before the Claims Tribunal, the Ministry contends that the Algiers Accords prohibit the Claimants’ attachment. The Ministry is wrong.

1. When the United States entered into the 1981 Algiers Accords to resolve the hostage crisis, it undertook to “restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979.” 20 I.L.M. at 224. The agreement also stated that the United States would “arrange . . . for the transfer to Iran of all Iranian properties which are located in the United States,” subject to certain exceptions. *Id.* at 227. The longstanding position of the United States is that this simply required the United States to return, as directed by Iran, specified Iranian properties that were in existence and subject to U.S. jurisdiction as of January 19, 1981 (the date of the Accords). The United States had no transfer obligation with respect to property that Iran acquired after the date of the Accords.

This interpretation of the Accords, offered by the United States Government, is entitled to “great weight.” *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 & n. 10 (1982); *see also* Restatement (Third) of Foreign Relations Law of the United States § 326(2). It also draws support from the Accords’ plain text. The Accords oblige the United States to return specified properties that “*are located* in the United States and abroad,” 20 I.L.M. at 226-27 (emphasis added); the use of the present tense shows that the assets to be transferred had to have been in existence at the time of the agreement.

That reading also accords with common sense. It is unreasonable to think that the United States had pledged to guarantee to restore Iran to its 1979 financial position indefinitely into the future, regardless of any post-1981 actions that Iran might make, and regardless of any efforts

that Iran itself might undertake to bring future assets into the United States. The United States pledged only to "restore" Iran's financial position, 20 I.L.M. at 224, not to freeze it for all time.

This interpretation also finds support in Executive Order No. 12281, which the Claims Tribunal has understood to be "part of the 'practice' of [the Algiers Accords] for purposes of its interpretation." *Iran v. United States*, 28 Iran-U.S. Cl. Trib. Rep. 112, 129 (1992). That executive order directed U.S. holders of Iranian properties to transfer the properties as directed by Iran "after the effective date of this Order," which was January 19, 1981. 46 Fed. Reg. at 7923. By tying the transfer obligation to the order's "effective date," the order made clear that the United States did not undertake in the Algiers Accords any obligation with regard to properties in the future. And to the extent the Executive Order itself might be ambiguous on that score, any ambiguity was cleared up by OFAC's implementing regulations, which expressly applied the transfer directive only to "properties held on January 18, 1981." 31 C.F.R. § 535.215(a).

2. In light of the above, the Claimants' attachment plainly would not place the United States in violation of the Accords, since the Claimants are attaching property that did not exist in 1981. As the Supreme Court has already held, the specific asset that the Claimants are trying to attach is not the training system itself (which was sent to Canada in 1982). Rather, they are trying to attach the "judgment enforcing [the] arbitration award based upon Cubic's failure to account to Iran for Iran's share of the proceeds of that system's sale." *Elahi*, 556 U.S. at 375-76. Iran's interest in that judgment did not arise until 1998, and its interest "in the property that underlies" that judgment did not even arise until 1982. *Id.* at 376-77. Because the judgment did not exist or come within U.S. jurisdiction until after 1981, attaching that judgment would not run afoul of the Algiers Accords.

* * * *

3. Even if the Ministry were correct that the relevant asset was the underlying training system, attachment would still not place the United States in violation of the Accords. As noted above, the Accords simply direct the United States to "restore" Iran to its November 1979 financial position. An attachment here would not violate that requirement, as it would merely be used to satisfy an outstanding judgment against Iran for events that postdate the Accords. Iran would still benefit from the full value of its judgment, since its outstanding liability to the Claimants would be reduced by that amount.

Without addressing this point specifically, the Ministry seems to assume that the Accords let Iran shield assets from creditors indefinitely, even for debts that postdate the Accords. But such an interpretation would mean that instead of "restoring" Iran's financial position, the Accords had improved that position by giving Iran a special immunity from future creditors. That is contrary to how the Iran-U.S. Claims Tribunal has understood the agreement. …It is also contrary to the longstanding construction of the Algiers Accords held by the United States Government.

II. The Judgment Is A "Blocked Asset" Under TRIA

The district court correctly concluded that the judgment is a "blocked asset" under two different IEEPA-based sanctions regimes, either of which would support attachment under TRIA.

A. The Judgment Is Blocked Under The 2012 Executive Order

Subject to certain exceptions, Executive Order 13539 blocks (among other things) "[a]ll property and interests in property of the Government of Iran . . . that are in the United States." 77 Fed. Reg. at 6659; *see also* 31 C.F.R. § 560.211(a). This Court has already found that the Ministry is "an inherent part of the state of Iran," *Ministry of Defense*, 495 F.3d at 1036, *rev'd on other grounds by Ministry of Defense v. Elahi*, 556 U.S. 366 (2009), meaning that the Ministry's judgment would be covered by this blocking order.

The Ministry nonetheless claims that the blocking order does not apply because it exempts the "property and interests in property of the Government of Iran" that had been blocked in 1979 and then made subject to the 1981 transfer directive. Ministry Br. 30-40; *see also* 77 Fed. Reg. at 6660; 31 C.F.R. § 560.210(f). But as the district court properly recognized, that argument is squarely foreclosed by the Supreme Court's decision in *Elahi*, which held that Iran's "interest in the Cubic Judgment" arose after January 1981. *Elahi*, 556 U.S. at 376. Accordingly, the Ministry's extended discussions of the 1977 contract with Cubic, and principles of Iranian contract law, are entirely irrelevant. *See* Ministry Br. 32-36.

Also irrelevant is the Ministry's assertion that 31 C.F.R. § 535.540(f) governed the proceeds of Cubic's sale to Canada. *See* Ministry Br. 36-40. As explained above, the Supreme Court held that the relevant asset here is *not* the proceeds of the sale, but the judgment confirming the arbitral award. *Elahi*, 556 U.S. at 376. In any event, Section 535.540(f) only requires sale proceeds to be transferred to Iran when the sale of otherwise blocked property is made pursuant to a specific type of OFAC license. The Supreme Court concluded in *Elahi* that the training system was *not* blocked after January 1981, *see Elahi*, 556 U.S. at 377, which meant that this regulation would have been irrelevant. …

B. The Judgment Is Blocked Under A Separate Sanctions Regime Governing Proliferators Of Weapons Of Mass Destruction

Apart from the fact that the judgment is blocked under the 2012 Executive Order, it is also blocked under an IEEPA sanctions regime targeting proliferators of weapons of mass destruction. That sanctions regime implements Executive Order 13382, *see* 70 Fed. Reg. at 38567; 31 C.F.R. § 544.201, and among other things it blocks the property of an Iranian entity known variously as the "Ministry of Defense and Armed Forces Logistics" and the "Ministry of Defense and Support for Armed Forces Logistics," as well as by the acronyms "MODSAF" and "MODAFL." 72 Fed. Reg. at 71992.

The district court—deferring to the expressed views of the United States—concluded that the Ministry was the exact entity targeted by this designation. MER 39. Since the Ministry had an interest in the judgment, the judgment became a blocked asset under this sanctions regime. *Id.*

On appeal, the Ministry no longer disputes that it is the targeted entity. Instead, it contends that this entire sanctions regime has been *sub silentio* modified by President Obama's subsequent 2012 executive order. Ministry Br. 40-44. If the Court addresses this argument—notwithstanding the Ministry's apparent waiver by failing to raise it in district court—the Court should reject it. The argument reflects a fundamental misunderstanding of IEEPA sanctions regimes.

Under IEEPA, the President can respond to a specific foreign threat by declaring a "national emergency with respect to such threat," and then taking various actions in response, including blocking transactions in property with a sufficient connection to a foreign sanctions target. 50 U.S.C. §§ 1701(a), 1702(a). The Weapons of Mass Destruction Proliferators Sanctions, which implement a 2005 executive order, are part of the government's response to a previously-recognized "national emergency . . . regarding the proliferators of weapons of mass destruction and the means of delivering them." 70 Fed. Reg. at 38567.

By contrast, the 2012 executive order is part of a separate sanctions regime, implemented in response to a separate emergency specifically related to Iranian policies. *See* 77 Fed. Reg. at 6659; 60 Fed. Reg. at 14615. Nothing about the 2012 order purports to modify the Weapons of Mass Destruction Proliferators Sanctions. Thus even if the Ministry is correct that the judgment is not blocked under the 2012 executive order, that fact has no bearing on whether the judgment is separately blocked under the Weapons of Mass Destruction Proliferators Sanctions (or under any other sanctions regime). *Accord* 31 C.F.R. § 560.101 (explaining that the regulations implementing the 2012 executive order are "separate from, and independent of" the OFAC regulations implementing other sanctions regimes); *id.* § 544.101 (same, as to the Weapons of Mass Destructions Proliferators Sanctions).

* * * *

(3) Villoldo

In *Villoldo*, plaintiffs sought to execute on a $2.8 billion judgment against Cuba for alleged acts of torture by the Cuban government. The federal district court ordered attachment of certain securities and accounts held by Computershares Ltd. before the United States became involved in the case based on plaintiffs' argument that certain Cuban laws had transferred ownership of these assets to the government of Cuba. *Villoldo et al. v. Castro Ruz et al. v. Computershare Ltd.*, No. 4:13-mc-94014-TSH (D. D. Mass).

On June 30, 2014, the United States filed a statement of interest which argues that the securities and accounts registered to individuals with Cuban addresses are not subject to attachment under TRIA and the FSIA because they have not been shown to be assets owned by the Cuban government. Excerpts follow from the U.S. brief (with footnotes omitted), which is available in full at *www.state.gov/s/l/c8183.htm*. The section of the brief articulating the applicability of the act of state doctrine is excerpted in Chapter 5.

The United States filed a similar brief on October 15, 2014 in a case brought by the same plaintiffs seeking to attach assets held by the Comptroller of New York in his capacity as custodian of unclaimed funds under New York's Abandoned Property Law. *Villoldo v. Castro Ruz v. DiNapoli*, Case No. 1:14-mc-25-LEK-CFH (N.D.N.Y.). That brief is also available at *www.state.gov/s/l/c8183.htm*.

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II. The Court Should Undertake a Full Analysis of Whether the Computershare Accounts Are Assets "of" Cuba

A. Consistent with important U.S. policy interests, TRIA and FSIA only permit the attachment of assets that are actually owned by the terrorist party

As this Court appears to have recognized in its Turnover Order, under TRIA and FSIA, in order for an asset to be subject to attachment and execution to satisfy a judgment in connection with a claim for which the foreign state was not immune under section 1605A, the asset must actually be owned by the judgment debtor terrorist party (or an agency or instrumentality thereof). … TRIA states that a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets of that terrorist party (including the blocked asserts of any agency or instrumentality *of* that terrorist party)." TRIA § 201(a) (emphasis added). Similarly, FSIA allows certain terrorism victims to attach certain "property *of* a foreign state" subject to a judgment under Section 1605A, and certain "property *of* an agency or instrumentality of such a state." 28 U.S.C. §§ 1610(a)(7), 1610(b)(3), 1610(g)(1) (emphases added).

Supreme Court decisions indicate that, when used in the context of similarly worded statutes, "the use of the word 'of' denotes ownership." *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Roche Molecular Sys.*, 131 S. Ct. 2188, 2196 (2011) (quoting *inter alia Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); see also *Calderon-Cardona*, 867 F. Supp. 2d at 399-400. The statutory language used in FSIA and TRIA is also notably narrower than the language used in the blocking regulations themselves, which apply to property in which the foreign state at issue has an "interest of any nature whatsoever," see, *e.g.*, 31 C.F.R. § 515.201 (CACR); *id*. § 538.307 (Sudan sanctions); *id*. § 560.323 (Iran sanctions), and in the specific context of Cuba, also extend to property in which Cuban nationals have such an interest, see 31 C.F.R. § 515.201(a). If Congress had intended for all assets subject to OFAC blocking regulations to be within the scope of TRIA or FSIA, it would most likely have adopted this broader language from the blocking regulations. See *Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 439-40 (D.D.C. 2005). This narrower reading of the statutory language is also consistent with FSIA's legislative history—the Conference Committee Report explained that section 1610(g)(1) authorizes the attachment of "any property in which the foreign state has a beneficial *ownership*." H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Report) (emphasis added); see also *id*. (explaining that the provision "is written to subject any property interest in which the foreign state enjoys beneficial *ownership* to attachment and execution" (emphasis added)).

Furthermore, there is no indication that Congress intended to expand TRIA and FSIA beyond well-established common law execution principles, according to which "'a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor.'" *Heiser*, 735 F.3d at 938 (quoting 50 C.J.S. Judgments § 787 (2013)). Thus, TRIA's and FSIA's attachment provisions are best understood as applying only to those blocked assets actually owned by the terrorist party, not all blocked assets in which the terrorist party has any interest of any nature.

Not only is this interpretation of TRIA and FSIA consistent with the plain language of those statutes, their legislative history, and traditional common law principles, but it is also supported by important U.S. policy interests. First, the United States has a strong interest in preserving the President's ability to use blocked assets as a tool of foreign policy. Allowing some plaintiffs to attach blocked assets that are not owned by the sanctions target (in this case, Cuba)

would selectively drain the pool of blocked assets, thereby reducing the leverage that these assets provide. See *Heiser*, 885 F. Supp. 2d at 441 ("Plaintiffs' sweeping interpretation would effectively—through future attachments and executions—eliminate the President's ability to use blocked assets as bargaining chips in solving foreign policy disputes."); *id*. at 435; *Rubin*, 709 F.3d at 57 ("The fact that blocked assets play an important role in the conduct of United States foreign policy may provide a further reason for deference to the views of the executive branch in this case.").

Second, an interpretation of TRIA and FSIA that permits attachment of blocked assets that the terrorist party does not own would effectively subsidize terrorist states by allowing plaintiffs to satisfy a judgment from assets owned by innocent third parties. …. In fact, not only would paying judgments from assets that are not owned by the terrorist party fail to impose a similar cost on the terrorist party, it would even assist terrorist parties by allowing them to reduce the outstanding judgments against them at the expense of innocent private parties. This concern is particularly acute here, where as a result of the Court's determination that Cuban laws nationalized the assets of account holders without any compensation, one set of victims of the Cuban regime's excesses would be paying Cuba's debt for Cuba's wrongs against other victims. That a substantial portion ($1 billion) of the plaintiffs' underlying judgment consists of punitive damages—intended to punish the wrongdoer rather than compensate the victim—further exacerbates this policy concern.

In sum, if the Computershare accounts are not owned by Cuba then they are not available to satisfy plaintiffs' judgment under FSIA or TRIA, and the Court's Turnover Order allowing for the transfer of these assets would be incompatible with the policy interests described above. Furthermore, absent a TRIA exception, the Court's order would amount to a transfer of blocked assets without an OFAC license, and thus would be null and void. See 31 C.F.R. § 515.203(e).

B. Before applying Cuban law, the Court should have conducted a choice-of-law analysis

Because TRIA and FSIA only allow the attachment of assets "of" the terrorist party, the Computershare accounts are not subject to attachment and execution unless they are owned by Cuba. Plaintiffs bear the burden of making this showing. See *Rubin*, 709 F.3d at 51. In its Turnover Order, the Court accepted plaintiffs' arguments and concluded that "by virtue of Cuban Law Nos. 567 and 568, the Blocked Assets held at Computershare are property of the Republic of Cuba and subject to attachment and execution." Turnover Order ¶ 6. But the Court's decision does not reflect that it engaged in any choice-of-law analysis to determine what law actually governs the question of ownership.

Because Congress has not provided a rule for determining ownership under TRIA or FSIA, federal courts generally apply state property law, and if necessary, state choice-of-law rules to determine whether assets located in the United States are subject to execution. See, *e.g.*, *Karaha Bodas Co. v. Pertamina*, 313 F.3d 70 (2d Cir. 2002) (applying state choice-of-law rules to determine ownership of property for purposes of attachment under FSIA); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (noting that FSIA, to which TRIA is appended, "operates as a 'pass-through' to state law principles" to "ensure that foreign states are liable in the same manner and to the same extent as a private individual under like circumstances"); *Calderon-Cardona*, 867 F. Supp. 2d at 400 (S.D.N.Y. 2011) (applying state law to determine ownership). Alternatively, at least one court "fashion[ed]" a federal common law rule of decision, applying certain provisions of the Uniform Commercial Code (UCC) to determine that contested fund transfers did not constitute property "of" Iran within the meaning of TRIA or FSIA. See *Heiser*, 735 F.3d at 940 (noting that the UCC "is often used as the basis

of federal common law rules").

Here, there is a clearly applicable choice-of-law provision under Massachusetts law. The section of the Massachusetts UCC governing securities (Section 8-110) provides that the applicable law for determining acquisition of a security entitlement from, and the duties of, a securities intermediary such as Computershare is the law of the "securities intermediary's jurisdiction"; this jurisdiction is determined either by reference to the relevant account agreement, or if not determined therein, by the location of the office serving the account or the intermediary's chief executive office. Mass. Gen. Laws ch. 106 § 8-110 (providing a test for determining the relevant jurisdiction, as well as four fallback rules). Alternatively, if the Court were to follow *Heiser* and engage in a federal common law choice-of-law analysis, UCC § 8-110 appears to be materially indistinguishable from the corresponding Massachusetts provision, and thus presumably would lead to the same result.

Whichever body of law is applied, the determination of ownership should be consistent with the weight of authority that favors a strict construction of attachment statutes in order to avoid punishing innocent parties—a consideration which is particularly acute with respect to blocked assets. See *Heiser*, 735 F.3d at 939. In other words, TRIA and FSIA should not be interpreted as recognizing an attachable property interest that would not otherwise be recognized in cases involving execution against unregulated assets.

The United States takes no position on whether federal courts should look to state choice-of-law rules or federal common law principles in order to apply TRIA's and FSIA's ownership requirement. But here, there is no indication reflected in the Turnover Order that the Court applied any choice-of-law rules before deciding that a foreign state's law, whatever its content, is the relevant law for determining ownership of accounts maintained by a securities intermediary in Massachusetts.

C. The Court should consider whether the principles embodied in the "penal law rule" preclude enforcement of the Cuban laws

Even assuming that a proper choice-of-law analysis would lead the Court to look to Cuban law to determine ownership of the assets, the court should consider whether application of the principles underlying the "penal law rule" should prevent it from applying Cuban Laws 567 and 568. Under that rule, courts in the United States have generally declined to give effect to foreign penal laws and foreign penal judgments in civil proceedings. …Plaintiffs themselves have described the Cuban laws at issue here as imposing a "penalty for violating a criminal law," see Pls.' Reply at 7, and the plain text of Law 568 also indicates that it is penal in nature, see State Department Official Translations of Cuban Law Nos. 567 & 568 (attached as Exhibit B). Thus, Law 568 is the type of law to which the penal law rule applies (and, as explained below, Law 567 appears to be irrelevant).

* * * *

(4) Calderon-Cardona

As discussed in *Digest 2012* at 302-05, the United States filed an *amicus* brief in *Calderon-Cardona* in the U.S. Court of Appeals for the Second Circuit in 2012, arguing that the district court properly denied plaintiffs' efforts to attach electronic fund transfers ("EFTs") in order to collect on a judgment against North Korea based on its support for terrorists whose attack in 1972 victimized plaintiffs' family members. On October 23, 2014, the Second Circuit issued its decision, affirming the district court's determination with respect to TRIA and FSIA § 1610(f)(1), but remanding to the district court for further consideration of whether the assets at issue were owned by North Korea and therefore attachable under FSIA § 1610(g). The Second Circuit opinion is excerpted below.

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1. TRIA § 201

Pursuant to TRIA, assets are attachable when "a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism." TRIA § 201(a). Here, the statutory text of TRIA unambiguously requires that there (1) be a judgment, (2) against a terrorist party, and (3) the claim underlying the judgment be based on an act of terrorism. See *United States v. Santos*, 541 F.3d 63, 67 (2d Cir. 2008) ("When a court determines that the language of a statute is unambiguous, its inquiry is complete."). While plaintiffs have a judgment against North Korea that is based on an act of terrorism, that judgment was not entered against a terrorist party. As the district court correctly observed, a foreign state is a "terrorist party" for purposes of TRIA § 201(d) when it is "'designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 . . . or Section 620A of the Foreign Assistance Act of 1961.'" *Calderon-Cardona*, 867 F. Supp. at 394 (quoting TRIA § 201(d)). North Korea was no longer designated a state sponsor of terrorism as of October 11, 2008. The underlying judgment was entered against North Korea on August 5, 2010, nearly two years later. At the time the judgment below was entered, therefore, because North Korea was not a state sponsor of terrorism, it was not a "terrorist party" within the meaning of TRIA. The underlying judgment, consequently, was not a judgment against a terrorist party at the time it issued.

Petitioners' contention that a state's previous, but now lifted, designation as a state sponsor of terrorism satisfies TRIA § 201(a)'s requirement that the judgment be entered against a "terrorist party" is unpersuasive. Although interpreting "a judgment against a terrorist party on a claim based on an act of terrorism" to include only judgments entered against a party that was a designated state sponsor of terrorism when the judgment was entered appears the more natural reading, petitioners' interpretation of the language as applying where the party against whom judgment was entered was a state sponsor of terrorism when the terrorist act was committed or when the action was commenced has at least some plausibility. The statutory context, however, makes clear that Congress intended the former meaning. In other parts of FSIA, when Congress has intended that a former state sponsor of terrorism be denied sovereign immunity for wrongs done during the time it was so designated, Congress has done so expressly. For example, in

creating the private right of action against foreign states under FSIA § 1605A(c) Congress expressly included states that were formerly designated as state sponsors of terrorism. FSIA § 1605A(c) ("A foreign state that is or was a state sponsor of terrorism . . . shall be liable."). It would be discordant to hold that Congress believed it needed to provide expressly that a former state sponsor of terrorism could be held liable in one part of FSIA, but that it only needed to do so impliedly in a later-enacted statute it codified as a note to FSIA. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret [a] statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." (internal citation and quotation marks omitted)). Accordingly, because their judgment was not issued against a terrorist party, petitioners may not attach the EFTs at issue pursuant to TRIA § 201(a).

2. FSIA § 1610(g)

Section 1610(g) is not limited in the same way as TRIA § 201(a). Under § 1610(g), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment. 28 U.S.C. § 1610(g)(1). Because, as noted, a "judgment . . . under § 1605A" expressly includes judgments against foreign nations formerly, but not currently, designated as state sponsors of terrorism, the fact that North Korea no longer has that designation does not bar attachment of North Korea's property, or that of its agents and instrumentalities, under § 1610(g).

Whether attachment of the EFTs under § 1610(g) is possible turns… on whether the blocked EFTs at issue are "property of" North Korea or "the property of an agency or instrumentality of" North Korea. …

"[W]hether or not midstream EFTs may be attached or seized depends upon the nature and wording of the statute pursuant to which attachment and seizure is sought." *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 116 (2d Cir. 2010). Congress has not defined the type of property interests that may be subject to attachment under FSIA § 1610(g). In particular, FSIA § 1610(g) is silent as to what interest in property the foreign state, or agency or instrumentality thereof, must have in order for that property to be subject to execution. Because of the absence of any definition of the property rights identified in the statutory text, we hold that FSIA § 1610(g) does not preempt state law applicable to the execution of judgments in this case. Moreover, given this gap in the contours of the legislation, we cannot infer that Congress intended merely to leave a void. We therefore apply the general rule in this Circuit that when Congress has not created any new property rights, but "merely attaches consequences, federally defined, to rights created under state law," we must look to state law to define the "rights the [judgment debtor] has in the property the [creditor] seeks to reach." *Asia Pulp*, 609 F.3d at 117 (first alteration in original) (internal quotation marks omitted). In short, Congress provided that "property" of a foreign state is subject to execution, and absent any indication that Congress intended a special definition of the term, "property" interests are ordinarily those created and defined by state law.

In this Circuit, two cases in particular interpret New York law delineating the property interests held by parties to an EFT that is intercepted midstream. In *Asia Pulp* and *Jaldhi*, we dealt with the interpretation of Article 4 of the New York Uniform Commercial Code ("NY UCC"), which governs EFTs held in New York banks. See N.Y. U.C.C. Law Ch. 38, Art. 4-A;

Asia Pulp, 609 F.3d at 118 (Article 4-A was "enacted to provide a comprehensive body of law that defines the rights and obligations that arise from wire transfers" (internal quotation marks omitted)). Looking to both the text of NY UCC § 4-A-503 and the official commentaries to that statute, we determined in *Jaldhi* that under New York law "EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank." *Jaldhi*, 585 F.3d at 71. In *Asia Pulp* we explained that this was so because "wire transfers, which include EFTs, are a unique type of transaction to which ordinary rules do not necessarily apply." *Asia Pulp*, 609 F.3d at 118. Because EFTs function as a chained series of debits and credits between the originator, the originator's bank, any intermediary banks, the beneficiary's bank, and the beneficiary, "the only party with a claim against an intermediary bank is the sender to that bank, which is typically the originator's bank." *Id*. at 119–20 (quoting Permanent Editorial Board for the Uniform Commercial Code Commentary No. 16 §§ 4A-502(d) and 4A-503, at 3 (2009)). Put another way, under the NY UCC's statutory scheme, the only entity with a property interest in an EFT while it is midstream is the entity immediately preceding the bank "holding" the EFT in the transaction chain. In the context of a blocked transaction, this means that the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests. We therefore hold that an EFT blocked midstream is "property of a foreign state" or "the property of an agency or instrumentality of such a state," subject to attachment under 28 U.S.C. § 1610(g), only where either the state itself or an agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT directly to the bank where the EFT is held pursuant to the block.

Because the district court's opinion issued prior to discovery relating to the details of the entities involved in the transaction chains of the EFTs at issue in this case, the record contains little to no evidence of whether the entities that transmitted the EFTs to the respondent banks were agencies or instrumentalities of North Korea. Without knowing the nature of those entities, we cannot determine whether the EFTs are properly attachable. Remand is therefore required for the parties to conduct discovery aimed at resolving the factual issues surrounding whether the entities that transmitted the EFTs to the respondent banks were agencies or instrumentalities of North Korea. Accord *Palestine Monetary Auth. v. Strachman*, 873 N.Y.S.2d 281 (App. Div. 1st Dep't 2009) (remanding for additional discovery where it was not known whether the bank that transmitted the EFT to the bank that was holding the EFT was controlled by a foreign government against which judgment was sought).

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(5) Hausler

On October 27, 2014, the U.S. Court of Appeals for the Second Circuit issued its decision on appeal in *Hausler*. See *Digest 2012* at 299-302 for background on the case. As in *Calderon-Cardona*, this case involves efforts to attach blocked electronic fund transfers ("EFTs"), though in this case, the plaintiffs sought to enforce a judgment against Cuba rather than North Korea. Consistent with its holding in *Calderon-Cardona*, the Second Circuit looked to state law to determine the ownership of the property at issue under FSIA § 1610(g). It held that the EFTs could not be attached because, under the law of

New York, where the banks holding the EFTs were located, Cuba did not have a property interest in the EFTs. Excerpts follow from the opinion of the Court of Appeals.

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"[W]hether or not midstream EFTs may be attached or seized depends upon the nature and wording of the statute pursuant to which attachment and seizure is sought." *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 116 (2d Cir. 2010). As with FSIA § 1610(g), Congress did not define the "type of property interests that may be subject to attachment under" TRIA § 201(a). *Calderon-Cardona*, slip op. at 12 (interpreting FSIA § 1610(g)). While the Cuban Assets Control Regulations, for purposes of those regulations, include a non-exhaustive list of types of property that may be attached, 31 C.F.R. § 515.311(a), EFTs involving a Cuban bank are not among the types of property identified. When Congress leaves a gap in a statute that "has not created any new property rights, but 'merely attaches consequences, federally defined, to rights created under state law,' we must look to state law to define the 'rights the judgment debtor has in the property the [creditor] seeks to reach.'" *Calderon-Cardona*, slip op. at 12–13 (quoting *Asia Pulp*, 609 F.3d at 117). Here, the banks at which the EFTs are blocked are in New York, so we look to New York property law to fill the gap.

We recently explained in *Calderon-Cardona* "that under New York law 'EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank.'" *Id*. at 13 (quoting *Jaldhi*, 585 F.3d at 71). As such, "the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests." *Id*. at 14. Thus, in order for an EFT to be a "blocked asset of" Cuba under TRIA § 201(a), either Cuba "itself or an agency or instrumentality thereof (such as a state-owned financial institution) [must have] transmitted the EFT directly to the bank where the EFT is held pursuant to the block." *Id*.

Unlike in *Calderon-Cardona*, where a remand was necessary to determine whether the EFTs at issue were attachable, it is undisputed that no Cuban entity transmitted any of the blocked EFTs in this case directly to the blocking bank. As a result, neither Cuba nor its agents or instrumentalities have any property interest in the EFTs that are blocked at the garnishee banks. Because no terrorist party or agency or instrumentality thereof has a property interest in the EFTs, they are not attachable under TRIA § 201.

* * * *

c. Discovery to aid in execution under the FSIA

(1) Discovery regarding sovereign assets outside the United States

As discussed in *Digest 2013* at 279-82, the United States filed a brief as *amicus curiae* in support of the petition for writ of certiorari filed in *Argentina v. NML Capital, Ltd.*, No. 12-842. For further background on the case, see *Digest 2012* at 315-19. After the

Supreme Court granted certiorari on January 10, 2014, the United States filed a further brief in support of petitioner, Argentina, urging reversal of the court of appeals. Excerpts follow from the March 2014 *amicus* brief of the United States.

* * * *

The FSIA sets forth two separate and independent rules of immunity: immunity of a foreign state from suit, and immunity of the property of a foreign state from attachment, arrest, or execution. Each of those immunities has exceptions, but those exceptions are also independent of each other—and the exceptions with respect to immunity from execution are considerably narrower than the exceptions that permit a U.S. court to exercise jurisdiction over a foreign state. A foreign state's property therefore may remain immune from execution under the FSIA even though the foreign state is subject to a judgment entered by a U.S. court. That carefully constructed framework preserves comity—since judicial seizure of a foreign state's property may be regarded as a serious affront to the state's sovereignty and affect our foreign relations with it—and addresses concerns about reciprocity for the United States when sued abroad.

Consistent with these immunity provisions, a district court's authority to order discovery into the property of a foreign state is necessarily limited, and extends only to assets as to which there is a reasonable basis to believe that an exception to execution immunity under the FSIA applies. Broad, general discovery into presumptively immune foreign-state property would impose the very costs and burdens that the immunity is intended to shield against in the first place. Discovery therefore must be restricted to the facts necessary to verify that assets fall within the scope of such an exception—exactly the kind of tailoring that courts undertake in various other immunity contexts, including qualified immunity cases. A court has jurisdiction over a foreign state in the first place only because a FSIA exception applies, and the FSIA and its exceptions therefore define the scope of the inquiry in which that court can engage.

Permitting more sweeping examination of a foreign state's assets by U.S. courts, thereby opening a substantial gap in what this Court has recognized to be a comprehensive scheme, would undermine the FSIA's purposes and have a number of adverse consequences. It would invade substantially a foreign state's sovereignty in an especially sensitive area and would be inconsistent with the comity principles the FSIA embodies. It would risk reciprocal adverse treatment of the United States in foreign courts. And it would more generally threaten harm to the United States' foreign relations on a variety of fronts. If Congress had wanted to authorize courts to issue discovery orders that could disrupt foreign policy in this way—a radical change to the prior legal regime, in which discovery of foreign-state property was not even contemplated because such property was absolutely immune from execution—Congress would have said so expressly. But it gave no indication of any such intent.

The district court in this case, styling itself a "clearinghouse" for virtually all information about Argentina's assets (Pet. App. 31), compelled discovery of several categories of foreign-state property that a U.S. court could not possibly execute against pursuant to the FSIA. The court improperly compelled discovery directed at assets located in other countries, even though the FSIA does not permit execution by a U.S. court except with respect to limited categories of foreign-state property located in the United States. The court also improperly compelled discovery of categories of property that are expressly immune from execution not only in the

United States but also elsewhere: central bank and military property, diplomatic property, and property belonging to individuals (including a sitting head of state) and entities other than the judgment debtor.

In allowing that discovery to proceed, the court of appeals believed that jurisdiction over Argentina authorized the discovery and that Argentina's sovereign immunity was not "affected" (Pet. App. 3). That approach disregards the separate immunity for foreign-state property that applies under the FSIA even when jurisdiction over a foreign state is proper. It takes no heed of the fact that a primary purpose of execution immunity is to protect against the burdens of litigation, including the burdens that Argentina has shouldered in this case. And, critically, it disregards the significant comity, reciprocity, and other foreign-relations concerns raised by wide-ranging discovery that treats a foreign state as if it were a mere private litigant—concerns that are not lessened when the discovery is directed at a bank or other third party. Accordingly, the judgment of the court of appeals should be reversed.

* * * *

The Supreme Court heard argument on April 21, 2014 and issued its decision on June 16, 2014, affirming the court of appeals. Excerpts follow from the Supreme Court's opinion (with some footnotes omitted). *Republic of Argentina v. NML Capital Ltd.*, 134 S.Ct. 2819 (2014).

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* * * *

The rules governing discovery in post-judgment execution proceedings are quite permissive. Federal Rule of Civil Procedure 69(a)(2) states that, "[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in the rules or by the procedure of the state where the court is located." See 12 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure §3014, p. 160 (2d ed. 1997) (hereinafter Wright & Miller) (court "may use the discovery devices provided in [the federal rules] or may obtain discovery in the manner provided by the practice of the state in which the district court is held"). The general rule in the federal system is that, subject to the district court's discretion, "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Fed. Rule Civ. Proc. 26(b)(1). And New York law entitles judgment creditors to discover "all matter relevant to the satisfaction of [a] judgment," N. Y. Civ. Prac. Law Ann. §5223 (West 1997), permitting "investigation [of] any person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts," D. Siegel, New York Practice §509, p. 891 (5th ed. 2011).

The meaning of those rules was much discussed at oral argument. What if the assets targeted by the discovery request are beyond the jurisdictional reach of the court to which the request is made? May the court nonetheless permit discovery so long as the judgment creditor shows that the assets are recoverable under the laws of the jurisdictions in which they reside, whether that be Florida or France? We need not take up those issues today, since Argentina has not put them in contention. In the Court of Appeals, Argentina's only asserted ground for objection to the subpoenas was the Foreign Sovereign Immunities Act. See 695 F. 3d, at 208 ("Argentina argues . . . that the normally broad scope of discovery in aid of execution is limited

in this case by principles of sovereign immunity"). And Argentina's petition for writ of certiorari asked us to decide only whether that Act "imposes [a] limit on a United States court's authority to order blanket post-judgment execution discovery on the assets of a foreign state used for any activity anywhere in the world." Pet. for Cert. 14. Plainly, then, this is not a case about the breadth of Rule 69(a)(2).[2] We thus assume without deciding that, as the Government conceded at argument, Tr. of Oral Arg. 24, and as the Second Circuit concluded below, "in a run-of-the-mill execution proceeding . . . the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States." 695 F. 3d, at 208. The single, narrow question before us is whether the Foreign Sovereign Immunities Act specifies a different rule when the judgment debtor is a foreign state.

B

To understand the effect of the Act, one must know something about the regime it replaced. Foreign sovereign immunity is, and always has been, "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B. V. v.Central Bank of Nigeria*, 461 U. S. 480, 486 (1983). Accordingly, this Court's practice has been to "defe[r] to the decisions of the political branches" about whether and when to exercise judicial power over foreign states. *Ibid*. For the better part of the last two centuries, the political branch making the determination was the Executive, which typically requested immunity in all suits against friendly foreign states. *Id*., at 486–487. But then, in 1952, the State Department embraced (in the so-called Tate Letter) the "restrictive" theory of sovereign immunity, which holds that immunity shields only a foreign sovereign's public, noncommercial acts. *Id*., at 487, and n. 9. The Tate Letter "thr[ew] immunity determinations into some disarray," since "political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Republic of Austria v. Altmann*, 541 U. S. 677, 690 (2004) (internal quotation marks omitted). Further muddling matters, when in particular cases the State Department did not suggest immunity, courts made immunity determinations "generally by reference to prior State Department decisions." *Verlinden*, 461 U. S., at 487. Hence it was that "sovereign immunity decisions were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Id*. at 488.

Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Ibid*. The key word there—which goes a long way toward deciding this case—is comprehensive. We have used that term often and advisedly to describe the Act's sweep: "Congress established [in the FSIA] a comprehensive framework for resolving any claim of sovereign immunity." *Altman*, 541 U. S., at 699. The Act "comprehensively regulat[es] the

[2] On one of the final pages of its reply brief, Argentina makes for the first time the assertion (which it does not develop, and for which it cites no authority) that the scope of Rule 69 discovery in aid of execution is limited to assets upon which a United States court can execute. Reply Brief 19. We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief.

amenability of foreign nations to suit in the United States." *Verlinden*, supra, at 493. This means that "[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar v. Yousuf*, 560 U. S. 305, 313 (2010). As the Act itself instructs, "[c]laims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles set forth in this [Act]." 28 U. S. C. §1602 (emphasis added). Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.

The text of the Act confers on foreign states two kinds of immunity. First and most significant, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607." §1604. That provision is of no help to Argentina here: A foreign state may waive jurisdictional immunity, §1605(a)(1), and in this case Argentina did so, see 695 F. 3d, at 203. Consequently, the Act makes Argentina "liable in the same manner and to the same extent as a private individual under like circumstances." §1606.

The Act's second immunity-conferring provision states that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter." §1609. The exceptions to this immunity defense (we will call it "execution immunity") are narrower. "The property in the United States of a foreign state" is subject to attachment, arrest, or execution if (1) it is "used for a commercial activity in the United States," §1610(a), and (2) some other enumerated exception to immunity applies, such as the one allowing for waiver, see §1610(a)(1)–(7). The Act goes on to confer a more robust execution immunity on designated international-organization property, §1611(a), property of a foreign central bank, §1611(b)(1), and "property of a foreign state . . . [that] is, or is intended to be, used in connection with a military activity" and is either "of a military character" or "under the control of a military authority or defense agency," §1611(b)(2).

That is the last of the Act's immunity-granting sections. There is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets. Argentina concedes that no part of the Act "expressly address[es] [postjudgment] discovery." Brief for Petitioner 22. Quite right. The Act speaks of discovery only once, in a subsection requiring courts to stay discovery requests directed to the United States that would interfere with criminal or national-security matters, §1605(g)(1). And that section explicitly suspends certain Federal Rules of Civil Procedure when such a stay is entered, see §1605(g)(4). Elsewhere, it is clear when the Act's provisions specifically applicable to suits against sovereigns displace their general federal-rule counterparts. See, *e.g.*, §1608(d). Far from containing the "plain statement" necessary to preclude application of federal discovery rules, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 539 (1987), the Act says not a word on the subject.[3]

Argentina would have us draw meaning from this silence. Its argument has several parts. First, it asserts that, before and after the Tate Letter, the State Department and American courts routinely accorded absolute execution immunity to foreign-state property. If a thing belonged to

[3] Argentina and the United States suggest that, under the terms of Rule 69 itself, the Act trumps the federal rules, since Rule 69(a)(1) states that "a federal statute governs to the extent it applies." But, since the Act does not contain implicit discovery-immunity protections, it does not "apply" (in the relevant sense) at all.

a foreign sovereign, then, no matter where it was found, it was immune from execution. And absolute immunity from execution necessarily entailed immunity from discovery in aid of execution. Second, by codifying execution immunity with only a small set of exceptions, Congress merely "partially lowered the previously unconditional barrier to post-judgment relief." Brief for Petitioner 29. Because the Act gives "no indication that it was authorizing courts to inquire into state property beyond the court's limited enforcement authority," *ibid*., Argentina contends, discovery of assets that do not fall within an exception to execution immunity (plainly true of a foreign state's extraterritorial assets) is forbidden.

The argument founders at each step. To begin with, Argentina cites no case holding that, before the Act, a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States courts. No surprise there. Our courts generally lack authority in the first place to execute against property in other countries, so how could the question ever have arisen? See Wright & Miller §3013, at 156 ("[A] writ of execution . . . can be served anywhere within the state in which the district court is held"). More importantly, even if Argentina were right about the scope of the common-law execution-immunity rule, then it would be obvious that the terms of §1609 execution immunity are narrower, since the text of that provision immunizes only foreign-state property "in the United States." So even if Argentina were correct that §1609 execution immunity implies coextensive discovery-in-aid-of-execution immunity, the latter would not shield from discovery a foreign sovereign's extraterritorial assets.

But what of foreign-state property that would enjoy execution immunity under the Act, such as Argentina's diplomatic or military property? Argentina maintains that, if a judgment creditor could not ultimately execute a judgment against certain property, then it has no business pursuing discovery of information pertaining to that property. But the reason for these subpoenas is that NML does not yet know what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law. If, bizarrely, NML's subpoenas had sought only "information that could not lead to executable assets in the United States or abroad," then Argentina likely would be correct to say that the subpoenas were unenforceable—not because information about non-executable assets enjoys a penumbral "discovery immunity" under the Act, but because information that could not possibly lead to executable assets is simply not "relevant" to execution in the first place, Fed. Rule Civ. Proc. 26(b)(1); N. Y. Civ. Prac. Law Ann. §5223. But of course that is not what the subpoenas seek. They ask for information about Argentina's worldwide assets generally, so that NML can identify where Argentina may be holding property that is subject to execution. To be sure, that request is bound to turn up information about property that Argentina regards as immune. But NML may think the same property not immune. In which case, Argentina's self-serving legal assertion will not automatically prevail; the District Court will have to settle the matter.

Today's decision leaves open what Argentina thinks is a gap in the statute. Could the 1976 Congress really have meant not to protect foreign states from post-judgment discovery "clearinghouses"? The riddle is not ours to solve (if it can be solved at all). It is of course possible that, had Congress anticipated the rather unusual circumstances of this case (foreign sovereign waives immunity; foreign sovereign owes money under valid judgments; foreign sovereign does not pay and apparently has no executable assets in the United States), it would have added to the Act a sentence conferring categorical discovery-in-aid-of-execution immunity on a foreign state's extraterritorial assets. Or, just as possible, it would have done no such thing. Either way, "[t]he question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Republic of Argentina v. Weltover, Inc.*, 504 U. S. 607, 618 (1992).

Nonetheless, Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause "a substantial invasion of [foreign states'] sovereignty," Brief for United States as Amicus Curiae 18, and will "[u]ndermin[e] international comity," *id.*, at 19. Worse, such orders might provoke "reciprocal adverse treatment of the United States in foreign courts," *id.*, at 20, and will "threaten harm to the United States' foreign relations more generally," *id.*, at 21. These apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago.[6]

* * * *

(2) Scope of post-judgment discovery and propriety of monetary contempt sanctions for failure to comply with such discovery

On September 9, 2014, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit in support of Iraq's appeal in *SerVaas Inc. v. Republic of Iraq*, Nos. 14-438, 14-569 (2d. Cir.) . SerVaas sought discovery to aid in enforcing against the Republic and its Ministry of Industry a 1991 French judgment entered against the Ministry in a contract case. The district court issued an order compelling Iraq to comply with broad discovery requests relating to the property of Iraq and its agencies and instrumentalities and then imposed sanctions of $2,000 per day when Iraq failed to abide by the order. The brief addresses the proper scope of discovery into foreign state property following the Supreme Court's decision in *NML Capital* (discussed *supra*), as well as the question of whether it is appropriate for courts to impose monetary contempt sanctions on foreign sovereigns. Excerpts follow from the U.S. brief (with most footnotes omitted). The brief is also available in full at www.state.gov/s/l/c8183.htm.

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[6] Although this appeal concerns only the meaning of the Act, we have no reason to doubt that, as NML concedes, "other sources of law" ordinarily will bear on the propriety of discovery requests of this nature and scope, such as "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state." Brief for Respondent 24–25 (quoting *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 543–544, and n. 28 (1987)).

POINT I

The District Court Should Not Have Compelled Iraq to Respond to Overbroad Discovery that Disregarded the Separate Juridical Status of Iraq's Agencies and Instrumentalities

In *NML Capital*, the Supreme Court recently addressed the "single, narrow question" of whether the FSIA "specifies a different rule" for post-judgment discovery where the judgment debtor is a foreign state. 134 S. Ct. at 2255. The Court concluded that it does not, reasoning that no provision of the FSIA explicitly "forbid[s] or limit[s] discovery in aid of execution," and refusing to imply a limitation from the general rule under the FSIA that a foreign state's property is immune from attachment or execution unless a specific statutory exception applies. *Id*. at 2256.

The Supreme Court made clear, however, that its ruling "concern[ed] only the meaning of the [statute]," and posited that "other sources of law ordinarily will bear on the propriety of discovery requests of this nature and scope, such as settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state." *Id*. at 2258 n.6 (internal quotation marks omitted). The Court also left open the question whether "the scope of Rule 69 discovery in aid of execution is limited to assets upon which a United States court can execute." *Id*. at 2255 n.2.

In this case, the district court erred in compelling Iraq to provide discovery responses with respect to any property in which Iraq's "agencies or instrumentalities (including State-owned entities and other commercial entities beneficially owned by the Republic)" have any right or interest. (A146, 153.) The United States does not take a position on which of the 226 entities Iraq claims are covered by the Asset Discovery Order are separate agencies and instrumentalities under the FSIA, as opposed to political subdivisions that are part of the state itself. However, demanding that a foreign state produce any documents it might have in its possession relating to assets and transactions of numerous separate agencies and instrumentalities, without any allegations or threshold showing that such entities would be responsible for paying the plaintiff's judgment against the state, is problematic for several reasons.[4]

First, it is well established that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," and the FSIA—consistent with law in other countries—does "'not permit execution against the property of one agency or instrumentality to satisfy a judgment against another,'" unless the plaintiff overcomes that presumption. *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-28 (1983) ["*Bancec*"] (quoting H.R. Rep. No. 94-1487, at 29-30 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6628-29). The Supreme Court has recognized that this presumption is based on "[d]ue respect for the actions taken by foreign sovereigns and for

[4] The United States is not taking a position on all aspects of the discovery that may have been ordered in this case. It is not entirely clear, for example, to what extent the Asset Discovery Order compels information about property and transactions outside the United States, or whether it requires the production of information about military, diplomatic, or central bank property, which is categorically immune from execution under the FSIA. Iraq's appeal does not appear to challenge the Asset Discovery Order on such grounds, and the United States understands that the parties had engaged in some informal negotiations to limit the scope of discovery into the Republic's property in certain respects. In light of these uncertainties, the United States does not take a position on whether the Asset Discovery Order was otherwise improper in compelling information about assets that are not potentially subject to attachment, which would raise substantial issues of comity and other concerns.

principles of comity between nations." *Id*. at 626-27. Thus, this Court has recognized that the assets of a separate juridical entity cannot be executed against to satisfy a judgment against the foreign state unless "'the party seeking attachment carrie[s] its burden of demonstrating that the instrumentality's separate juridical status was not entitled to recognition.'" *Walters v. Indus. & Commercial Bank of China, Ltd*., 651 F.3d 280, 298 (2d Cir. 2011) (quoting *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 477 (2d Cir. 2007)). To make this showing, the party seeking attachment must show that "the instrumentality is 'so extensively controlled by its owner that a relationship of principal and agent is created,'" or that "recognizing the instrumentality's separate juridical status would 'work fraud or injustice.' " *EM*, 473 F.3d at 477 (quoting *Bancec*, 462 U.S. at 628-29).

Courts have concluded that the *Bancec* presumption of juridical separateness must inform questions relating to the propriety of post-judgment discovery. As noted above, that presumption is based on principles of comity and respect for the dignity and sovereignty of foreign states, particularly in their operations within their own jurisdiction. See *Bancec*, 462 U.S. at 626; see generally *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-66 (2008); *In re Schooner Exchange*, 7 Cranch (11 U.S.) 116, 137 (1812). Courts, including this Court, have concluded that it would be inconsistent with *Bancec* and comity principles to order discovery into the property and finances of a separate instrumentality of a foreign-state judgment debtor without some threshold showing by a litigant that there is reason to think a separate juridical entity is an alter ego of the state and accordingly liable for its judgment. See, *e.g*., *Sejias v. Republic of Argentina*, 502 F. App'x 19, 20-21 (2d Cir. 2012); *Olympic Chartering, S.A. v. Ministry of Industry & Trade of Jordan*, 134 F. Supp. 2d 528, 530 (S.D.N.Y. 2001).

* * * *

The fact that the discovery requests at issue here were directed to Iraq (seeking information in its possession or custody) and did not request that Iraq's separate agencies and instrumentalities themselves produce information does not change the *Bancec* analysis. Indeed, the discovery in *Sejias* was sought from both the judgment debtor, Argentina, and its alleged alter ego, the bank, see *Sejias v. Republic of Argentina*, No. 10 Civ. 4300 (TPG), 2011 WL 1137942, at *1 (S.D.N.Y. Mar. 28, 2011), but the court found both requests to be inappropriate. The discovery sought in Olympic was from a third-party bank (neither the judgment debtor nor its alleged alter ego, the Central Bank of Jordan), 134 F. Supp. 2d at 529, but the court nevertheless quashed the subpoena.

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To allow broad, general asset discovery into government documents relating to assets and transactions of a wide range of presumptively separate agencies and instrumentalities in the absence of any threshold alter ego showing is likely to impose a considerable burden on the foreign state and be viewed as an affront by the sovereign. Foreign states may be acutely sensitive to the intrusiveness of such discovery requests because the "scope of American discovery is often significantly broader than is permitted in other jurisdictions." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S.D. of Iowa*, 482 U.S. 522, 542 (1987).

In addition, overly broad discovery of this nature can also lead to reciprocal adverse treatment of the United States in foreign courts. See *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc*., 179 F.3d 1279, 1295 (11th Cir. 1999). For a variety of reasons, the U.S. government may decide not to pay judgments entered in foreign courts (*e.g.*, where the United States' position is that service did not comport with the requirements of customary international law, the court lacked jurisdiction over the dispute, payment of the judgment would conflict with a U.S. law, or the judgment is inconsistent with fundamental U.S. sovereign interests). In some cases, private litigants have sought post-judgment discovery in an effort to enforce such judgments. The United States would have serious concerns should a foreign court require it to respond to similarly intrusive inquiries from a private judgment creditor attempting to determine if any separate U.S. agencies might have property or commercial transactions with "ties" to the forum state, before coming forward with any threshold showing that such agencies are alter egos of the U.S. government such that their property could be levied upon to satisfy a judgment against the government.

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Point II

The District Court Erred in Imposing Monetary Contempt Sanctions on Iraq

The district court also erred in imposing monetary sanctions against Iraq for its failure to comply with the Asset Discovery Order. As an initial matter, to the extent the discovery ordered was overbroad, sanctions for noncompliance were unwarranted. Cf. *FG Hemisphere Assocs., LLC v. Dem. Rep. of Congo*, 637 F.3d 373, 379 & n.3 (D.C. Cir. 2011) (noting, but not deciding, "serious[ ]" concerns about a district court imposing sanctions for non-compliance with overbroad discovery); *In re Air Crash at Belle Harbor*, 490 F.3d 99, 106-07 (2d Cir. 2007) (explaining that, in order to appeal an overbroad discovery order, a party must sometimes subject itself to a potential contempt finding). Furthermore, even if some of the discovery into Iraq's property was permissible, it is generally inappropriate for courts to impose unenforceable orders of monetary contempt sanctions against a foreign state. The FSIA provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in United States courts. See *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434-35 (1989). As discussed below, orders of monetary contempt sanctions are unenforceable under the FSIA. As such, a number of factors weigh decisively against imposing them on a foreign sovereign: basic considerations of equity and comity, the fact that such orders are inconsistent with international practice, and foreign relations concerns, including issues of reciprocity raised by such orders.

This Court has not yet squarely addressed the propriety of imposing monetary contempt sanctions against a foreign sovereign. …

Other circuits have reached varying conclusions on the issue presented here. Consistent with the United States' position, the Fifth Circuit held that a district court errs in imposing monetary contempt sanctions on a foreign state because the FSIA establishes the "sole, comprehensive scheme" for enforcing judgments against foreign states, and orders imposing monetary sanctions for contempt are not enforceable under the FSIA. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428-29 (5th Cir. 2006). In contrast, the D.C. Circuit upheld an order of monetary contempt sanctions against a foreign state; however, that court's holding was narrow, focusing on the limited question of whether the inherent authority of a federal court to impose

contempt sanctions had been entirely displaced by the FSIA. See *FG Hemisphere*, 637 F.3d at 377-80 ("We hold today only that the FSIA does not abrogate a court's inherent power to impose contempt sanctions on a foreign sovereign, and that the district court did not abuse its discretion in doing so here.").

The United States is not arguing that U.S. courts lack inherent equitable authority or jurisdiction to entertain contempt proceedings against foreign states. Rather, in our view, district courts err when they exercise their authority to impose such unenforceable orders in light of the various considerations weighing against them in this context.

A. Orders of Monetary Contempt Sanctions Against a Foreign State Are Unenforceable

The FSIA establishes a general rule that property of a foreign state is immune from execution or attachment. See 28 U.S.C. § 1609. Absent a foreign state's waiver of immunity from execution of an order imposing monetary sanctions, such an order does not fall within any statutory exception to immunity from execution. See *id*. § 1610(a). The FSIA thus provides no mechanism for a U.S. court to enter an enforceable contempt order imposing monetary sanctions against an unwilling foreign state. See *Af-Cap*, 462 F.3d at 428 ("A review of the relevant sections, [28 U.S.C.] § 1610 and § 1611, shows that they do not present a situation in which the [sanctions] order could stand. Those sections describe the available methods of attachment and execution against property of foreign states. Monetary sanctions are not included."). We are not aware of any courts concluding otherwise. See *FG Hemisphere*, 637 F.3d at 377 (acknowledging without reaching questions about enforceability of a monetary sanctions order against a foreign state); *Agudas Chasidei Chabad v. Russian Fed'n*, 915 F. Supp. 2d 148, 152 (D.D.C. 2013) (recognizing that enforcement of a monetary sanctions order would be "carefully restricted by the FSIA").

The legislative history of the FSIA also supports the conclusion that contempt sanctions may not be enforceable in the absence of a waiver. For example, the accompanying House Report notes in the context of injunctions and specific performance orders that it may be appropriate to issue such orders in certain circumstances, but states that "this is not determinative of the power of the court to enforce such an order." H.R. Rep. No. 94-1487, at 22, reprinted in 1976 U.S.C.C.A.N. at 6621. In particular, the report recognized that a contempt "fine for violation of an injunction may be unenforceable if immunity exists under [28 U.S.C. §§] 1609-1610." *Id*.

B. Equitable Principles Weigh Against the Issuance of Unenforceable Orders Imposing Monetary Contempt Sanctions on Foreign States

As a general matter, a court "should not issue an unenforceable" order against a foreign state. *In re Estate of Marcos Human Rights Litig*., 94 F.3d 539, 545, 548 (9th Cir. 1996). In exercising its equitable authority, a court should consider whether its orders will be effective and should utilize the least amount of compulsion necessary to achieve the desired end. See, *e.g*., *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 637 n.8 (1988); see also *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 550 (1937) ("[A] court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff.").

The Contempt Sanctions Order appears to have been motivated by a desire to compel Iraq's compliance with the Asset Discovery Order. … However, an award of monetary contempt sanctions is simply not a meaningful way to ensure a foreign state's compliance with district court orders; it is more likely to accumulate uncollectable penalties.

In *FG Hemisphere*, the D.C. Circuit concluded that a district court need not consider whether a monetary sanctions order is enforceable against a foreign state before imposing such sanctions, because the FSIA "is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution." 637 F.3d at 377-79. The court's analogy between monetary contempt sanctions and unsatisfied money judgments was erroneous, however. There are significant distinctions between entry of a judgment against a foreign state under 28 U.S.C. § 1605, which a plaintiff may or may not be able to enforce against a foreign state's property in the United States, and a court's exercise of its equitable powers to impose unenforceable monetary contempt sanctions. As an initial matter, there is widespread acceptance in modern international law that foreign states' immunity from adjudication may be restricted and judgments entered against foreign states in such cases, see generally Restatement (Third) of Foreign Relations Law, § 451 (1987); Hazel Fox, "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States," in *International Law*, 340, 355 (Malcolm D. Evans ed., 3d ed. 2010), and foreign states can and do voluntarily pay judgments entered under § 1605. Should a state fail to do so, a judgment entered against a foreign state is not categorically unenforceable against the state's property; the question is whether the foreign state has property in the United States that satisfies an applicable exception to execution immunity. Even in the absence of nonimmune property in the United States, a plaintiff may be able to locate attachable assets in the United States in the future; to register and enforce the judgment in another country; or to enlist the help of the U.S. State Department, which can urge the foreign state to pay the judgment.

In contrast, as discussed below, there is widespread acceptance in international practice that it is not appropriate to impose penalties on foreign states for noncompliance with a court order, so there is almost no possibility that a foreign state would voluntarily pay monetary contempt sanctions. Monetary contempt sanctions are generally viewed by foreign governments as inconsistent with principles of mutual respect and equality among sovereigns, so, rather than serving as an effective mechanism for encouraging compliance, such orders are likely to exacerbate existing disputes or lead to the foreign government's refusal to participate further in the litigation. Finally, a court issuing a monetary sanctions order against a foreign state has no possibility of enforcing its order: under the FSIA, the court lacks the authority to compel payment of the sanctions absent a specific waiver, and such an order will not be enforced in foreign courts. See infra Part II.C.

The conclusion that equitable considerations foreclose the imposition of monetary contempt sanctions in this case is buttressed by the statutory prohibition on awarding punitive damages against a foreign state in 28 U.S.C. § 1606. The district court ordered Iraq to pay significant monetary fines, totaling nearly $500,000 as of the date of this filing, and continuing to accrue at a rate of $2,000 per day. …It is hard to see how such orders can be squared with § 1606's categorical ban on punitive damages against a foreign state.

C. Monetary Contempt Sanctions Orders Are Inconsistent with International Practice

A review of international and foreign law sources demonstrates that orders of monetary contempt sanctions against a foreign sovereign are considered inappropriate.

For example, the European Convention on State Immunity bars a court from imposing monetary sanctions on a foreign state that is a party to judicial proceedings in another party state for "its failure or refusal to disclose any documents or other evidence." European Convention on

State Immunity, art. 18, May 16, 1972, E.T.S. No. 74, 11 I.L.M. 470 (1972), available at *http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm*. Under the Convention, a court faced with a foreign state's noncompliance is limited to remedies involving "whatever discretion [the court] may have under its own law to draw the Appropriate conclusions from a State's failure or refusal to comply." *Id*. Explanatory Report, art. 18, ¶ 70, available at *http://conventions.coe.int/Treaty/EN/Reports/Html/074.htm*.

Similarly, the United Nations Convention on Jurisdictional Immunities of States and Their Property provides that "[a]ny failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act . . . shall entail no consequence other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal." United Nations Convention on Jurisdictional Immunities of States and Their Properties, art. 24(1), G.A. Res. 59/38, annex, Dec. 2, 2004, 44 I.L.M. 803 (2005). The Convention is not yet in force, and the United States is not a signatory to it. Nevertheless, a number of the Convention's provisions, including Article 24(1), reflect current international norms and practices regarding foreign state immunity. Notably, the principle reflected in Article 24 of the Convention was uniformly supported by member states, which disagreed only about whether to extend even further a state's immunity from coercion. See Int'l Law Comm'n, *Jurisdictional Immunities of States and Their Property, Comments and Observations Received from Governments*, U.N. GAOR Supp. No. 10, at 24, 33, 58, U.N. Doc. A/CN.4/410 24 (Feb. 17, 1988), available at *http://legal.un.org/ilc/documentation/english/a_cn4_410.pdf* (comments of the United Kingdom and Mexico).

Finally, a number of nations that have codified foreign sovereign immunity law, including Canada, the United Kingdom, Israel, and Australia, have prohibited monetary sanctions against a foreign state for its failure to comply with an injunctive order.

* * * *

D. Foreign Relations and Reciprocity Concerns Counsel Against the Imposition of Unenforceable Monetary Sanctions Orders

The potential adverse consequences for our foreign relations, as well as for the treatment of the U.S. government abroad, also counsel against U.S. courts issuing unenforceable monetary contempt sanctions orders. These concerns are not generic or theoretical. By way of example, in the *Chabad* case cited above, a district court imposed monetary contempt sanctions of $50,000 per day against the Russian Federation in an effort to compel its compliance with the court's specific-performance order directing Russia to transfer a collection of religious books and other documents to the plaintiff. See 915 F. Supp. 2d at 153-55.

The court's sanctions order has not led to compliance, however. Instead, it has created another obstacle in the diplomatic efforts aimed at resolving the dispute. See Statement of Interest of the United States, *Chabad*, No. 1:05-cv-01548-RCL, Ex. A, at 2 (D.D.C. filed Feb. 21, 2014) (letter from Mary E. McLeod, U.S. State Dep't, to Stuart Delery, U.S. Dep't of Justice (Feb. 20, 2014)) [ECF Docket No. 134-1]. In addition, following the sanctions order, the Russian Ministry of Culture and the Russian State Library filed a lawsuit in Moscow, naming the United States and the Library of Congress as defendants and requesting that the court issue a similar order compelling the United States and the Library of Congress to return to Russia seven of books from the collection, and imposing a $50,000 daily fine for each day of noncompliance. See

id. The Moscow court has since granted this request. See Decision, Case No. A40-82596/13, slip op. at 11 (Comm'l Ct. of Moscow May 29, 2014) (Russ.).

This case illustrates the risk that monetary contempt sanctions orders will undermine efforts to resolve underlying disputes, and have negative consequences for the United States overseas. While the D.C. Circuit declined to defer to the United States' foreign relations and reciprocity concerns in *FG Hemisphere*, *see* 637 F.3d at 380, these are matters on which particular deference is owed to "the considered judgment of the Executive." *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (noting that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (concluding that "[t]he Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling").

More generally, while foreign courts for the most part have followed accepted international practice and not allowed monetary contempt sanctions against other sovereigns, orders of U.S. courts imposing monetary contempt sanctions on foreign states may embolden foreign courts to impose similar sanctions on the United States. The U.S. government has a significant presence abroad and is frequently subject to suit in foreign courts. As noted earlier, for a variety of reasons, there are circumstances in which the United States may not comply with orders of foreign courts. Orders of U.S. courts imposing monetary contempt sanctions risk creating a precedent that may be relied upon in such cases.

* * * *

d. Availability of monetary contempt sanctions to further enforcement

The United States filed an additional statement of interest in *Chabad v. Russian Federation*, No. 01548 (D.D.C.) in 2014. See *Digest 2012* at 319-23 for a discussion of the statement of interest of the United States filed in 2012 and *Digest 2011* at 445-47 for a discussion of the statement of interest of the United States filed in 2011. The 2014 statement of interest asserts that granting Chabad's motion for an interim judgment of accrued contempt sanctions would be inconsistent with the FSIA and unwarranted. The court imposed monetary contempt sanctions on the Russian government defendants in January 2013, following their failure to comply with a default judgment and order directing the defendants to return a collection of religious books and other documents to plaintiff Chabad. The U.S. statement of interest is excerpted below and available at *www.state.gov/s/l/c8183.htm*. The exhibit referenced in the statement of interest, a February 20, 2014 letter from Mary McLeod to Stuart Delery, is also available at *www.state.gov/s/l/c8183.htm*.

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A. Entry of an Interim Judgment Accruing Sanctions Would Be Improper Under the FSIA

As the United States discussed in its previous Statement of Interest, the FSIA does not authorize the imposition of contempt sanctions as a means of enforcing the Court's order directing Russia to surrender tangible property that is within Russia's possession and located within Russia's borders. See ECF No. 111 at 4-10. The FSIA provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in United States courts. See *Arg. Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434-435 (1989). The FSIA, furthermore, "explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution." *FG Hemispheres Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011). As the United States has explained, rather than following the carefully crafted enforcement scheme set forth in the FSIA, Chabad has been pursuing an alternative enforcement framework for its judgment in which the Court would first issue a specific performance order for property overseas and then seek to enforce that order through contempt proceedings. Just as the question of whether sanctions can be enforced against a foreign state implicates the FSIA's enforcement provisions, …, so too do Chabad's request for sanctions and its most recent request for an interim judgment. See 28 U.S.C. § 1610(a); H.R. Rep. No. 94-1487, at 28 ("The term 'attachment in aid of execution' is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment.").

The FSIA is clear that any exception from execution immunity applies only where a foreign state possesses "property in the United States," and even that property is subject to execution in an extremely limited number of circumstances. 28 U.S.C. ' 1610(a); see also *Autotech Techs. LP v. Integral Research & Dev. Corp*., 499 F.3d 737, 750 (7th Cir. 2007) (observing that "the FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction."). These careful limitations on enforcing judgments on a foreign state's property—including an absolute prohibition on enforcing on a foreign state's property located outside of the United States—stem from the fact that, "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002) (emphasis added).

Imposition of sanctions against Russia in an effort to compel it to surrender property it holds within its own borders violates this basic principle of execution immunity under the FSIA. Although neither the Court's specific performance order nor its order for contempt sanctions was denominated as an order of attachment or execution on property, the substance of the order, not its form, controls. See *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983) (noting that "[t]he FSIA would become meaningless" if the denomination of an order controlled over its substance); …. As explained in the United States' prior filing, the FSIA does not authorize enforcement of the Court's specific performance order regarding property in Russia through an order sanctioning Russia for its non-compliance with that order. …

Entry of an interim judgment accruing sanctions in these particular circumstances presents the same concerns because such a judgment would be designed to force Russia to comply with the specific performance order not authorized by the FSIA. Indeed, Chabad admits that the purpose of its motion for an interim judgment is "to provide an incentive for Russia to comply with the Court's ruling," and to speed the timing of [the Collection's] return." …. The FSIA, however, does not authorize a court to direct the disposition of property possessed by a foreign state within its own borders by any means. Entry of the requested interim judgment accruing sanctions for non-compliance with such an order is simply not consistent with the carefully defined, and limited, system of remedies authorized under the FSIA. Chabad's motion therefore should be denied.

B. Even If the Proposed Interim Judgment Were Consistent with the FSIA, the Court Should Exercise Its Discretion Not to Issue Such an Order, Which Implicates Significant Foreign Policy Interests of the United States

Should the Court conclude that it has authority to enter the interim judgment Chabad seeks, the Court should nevertheless deny the motion in the proper exercise of its equitable and remedial authority and discretion. Chabad's request for another order seeking to compel the disposition of property possessed by a foreign state within its own borders implicates significant foreign policy interests of the United States. Although Chabad's motion indicates that it is seeking the interim judgment in order to "speed the timing of [the Collection's] return," the United States' view is that the Court's sanctions order has instead created another obstacle in the ongoing diplomatic efforts to resolve the dispute, and it is the United States' position that an interim judgment of sanctions will not facilitate the return of the Collection. See Exhibit A, Letter dated February 20, 2014, from Mary E. McLeod, Principal Deputy Legal Adviser, United States Department of State, to Stuart Delery, Assistant Attorney General, United States Department of Justice ("We continue to believe that an out-of-court dialogue presents the best means towards an ultimate resolution, and we have emphasized to Chabad the Department's belief that further steps in the litigation will not be productive.").

Moreover, it is clear from Chabad's motion that it sees the entry of an interim judgment as a step that will allow it to seek enforcement of that judgment through steps that include discovery into and actual attachment of Russian government property. ECF 127 at 6 (referring to "registration of the monetary judgment in other jurisdictions, discovery regarding Russian Federation property, and ultimately, attachment and liquidation of that property"). The Court should be aware that these further enforcement actions would cause even greater harm to the United States' foreign policy interests, including the United States' interest in promoting a resolution of the dispute between Chabad and Russia over the Collection.

It is widely recognized that efforts to enforce judgments or orders against a foreign state's property can cause significant harm to the foreign policy interests of the United States, and that this harm may be materially more grave than the adverse consequences that follow from the issuance of a judgment or order against a foreign state. As the Court recognized in its Memorandum Opinion accompanying the sanctions order, actions to enforce a sanctions award issued against a foreign state are "carefully restricted by the FSIA." Mem. Op. on Contempt Sanctions, ECF No. 116, at 6. These restrictions were deliberately put in place by Congress, based on its understanding that "enforcement [of] judgments against foreign state property remains a somewhat controversial subject in international law." H.R. Rep. No. 94-1487, at 27. Indeed, Congress was made aware that, prior to passage of the FSIA, many plaintiffs had sought to establish jurisdiction over a foreign state by obtaining a pre-judgment attachment on the

sovereign's property, a practice that gave rise to "serious friction in the United States' foreign relations." Id. at 26-27; …. The Supreme Court likewise has taken note of the serious foreign policy consequences that may flow from attachment of foreign state property, observing that "[t]he judicial seizure" of the property of a foreign sovereign may well "be regarded as an affront to its dignity and may affect our relations with it." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (internal quotation and ellipses omitted; brackets in original). As a basic principle, "[t]he FSIA's purpose was to promote harmonious international relations," *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998), and permitting a plaintiff to enforce a judgment or sanctions order such as those at issue here, whether through attachment or by other means, poses a serious threat to those relations.

With respect to this matter in particular, the Department of State has concluded that, if Chabad were to take the further enforcement steps it has outlined in its recent motion, such actions would cause significant harm to the foreign policy interests of the United States, including "considerable damage to any prospects for securing the transfer of the Collection." See Exhibit A.

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B. IMMUNITY OF FOREIGN OFFICIALS

1. Overview

In 2010, the U.S. Supreme Court held in *Samantar v. Yousuf* that the FSIA does not govern the immunity of foreign officials. See *Digest 2010* at 397-428 for a discussion of *Samantar*, including the *amicus* brief filed by the United States and the Supreme Court's opinion. The cases discussed below involve the consideration of foreign official immunity post-*Samantar*.

2. President Zedillo of Mexico

As discussed in *Digest 2013* at 286 and *Digest 2012* at 345-46, the United States filed a suggestion of immunity in a case brought against the former president of Mexico, Ernesto Zedillo Ponce de Leon, in U.S. district court in Connecticut. *Doe v. Zedillo*, No. 3:11-cv-01433. After the district court dismissed the case, plaintiffs appealed. The United States filed its brief as *amicus* on appeal in the U.S. Court of Appeals for the Second Circuit in January 2014, arguing that the district court correctly deferred to the State Department's immunity determination and dismissed the case. Excerpts follow from the *amicus* brief of the United States (with footnotes omitted). On February 18, 2014, the Court of Appeals affirmed the district court's dismissal of the case. *Zedillo v. De Leon*, 555 Fed. Appx. 84 (2d Cir. 2014).

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A. The Supreme Court and this Court have long recognized that Executive Branch determinations concerning foreign sovereign immunity are binding on the courts. See, *e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945) ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow."); *Ex Parte Peru*, 318 U.S. 578, 587-589 (1943) ("'[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' ") (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)).

In *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), the Supreme Court held that although the Foreign Sovereign Immunities Act (FSIA) transferred determination of immunity for states from the Executive Branch to the Judicial Branch, the Act left in place the Executive Branch's historical authority to determine the immunity of foreign officials. *Id*. at 2290-2292. Under that rule, if the State Department determines that an individual is immune and makes a Suggestion of Immunity, "the district court surrender[s] its jurisdiction." *Id*. at 2284-2285. If the State Department takes no position on immunity, "a district court ha[s] authority to decide for itself whether all the requisites for such immunity existed," applying "the established policy" of the State Department to make that determination. *Ibid*. (citations and internal quotation marks omitted). *Samantar* made clear that this same rule applies to "cases involving foreign officials." *Ibid*. (citing *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971), and *Waltier v. Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960), which involved consular officials, who were immune only for acts carried out in their official capacity).

The pre-FSIA immunity decisions that the Supreme Court cited in *Samantar* confirm that the State Department's determination regarding immunity is, and historically has been, binding in judicial proceedings. In *Ex Parte Peru*, 318 U.S. 578, for example, the Supreme Court held that in suits against foreign governments, "'the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' " *Id*. at 588 (quoting *Lee*, 106 U.S. at 209). In *Republic of Mexico v. Hoffman*, 324 U.S. 30, the Supreme Court made clear that "[e]very judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government." *Id*. at 35 (emphasis added). The Court instructed that it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Ibid*.; see also, *e.g.*, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) ("If the claim [of immunity] is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General.").

There is a longstanding recognition that foreign officials are immune "from suits brought in [United States] tribunals for acts done within their own [S]tates, in the exercise of governmental authority." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see, *e.g.*, *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794) ("[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant . . ., [that] will of itself be a sufficient answer to the plaintiff's action."). In pre-FSIA suits against foreign officials, courts followed the same procedure as in suits against foreign states. See, *e.g.*, *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976) ("The Suggestion of Immunity removes the individual defendants from this case. When the State Department formally recognizes and allows sovereign immunity of a defendant, a federal court will not exercise jurisdiction over that defendant.") (cited in *Samantar*, 130 S. Ct. at 2290); *Heaney*, 445 F.2d at 504-506 (applying

principles articulated by the Executive Branch because the Executive did not express a position in the case); see also *Samantar*, 130 S. Ct. at 2284-2285.

Thus, both before and after *Samantar*, courts of appeals have recognized that the Executive Branch's suggestions of immunity are binding and conclusive, including in civil cases that involve present or former foreign officials. See, *e.g.*, *Manoharan v. Rajapaksa*, 711 F.3d 178, 179 (D.C. Cir. 2013) (per curiam) (explaining that the United States submitted a Suggestion of Immunity and "[a]ccordingly," the district court "was without jurisdiction"); *Habyarimana v. Kagame*, 696 F.3d 1029, 1031-1033 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit . . . 'as a conclusive determination by the political arm of the Government[.]' ") (quoting *Ex Parte Peru*, 318 U.S. at 589); *Giraldo v. Drummond Co.*, 493 F. App'x 106 (D.C. Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 1637 (2013); *Matar v. Dichter*, 563 F.3d 9, 13-15 (2d Cir. 2009) ("defer[ring] to the Executive's determination of the scope of immunity"); *Ye v. Zemin*, 383 F.3d 620, 625, 627 (7th Cir. 2004) ("[T]he Executive Branch's suggestion of immunity is conclusive and not subject to judicial inquiry. . . . We are no more free to ignore the Executive Branch's determination than we are free to ignore a legislative determination concerning a foreign state."); see also *Southeastern Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974) (rejecting argument that district court "erred . . . in accepting the executive suggestion of immunity without conducting an independent judicial inquiry"); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere."); *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) ("[W]e conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry.").

Indeed, this Court's decision in *Dichter*, 563 F.3d 9, controls the outcome of this case. In *Dichter*, the Court held that it must defer to the Executive Branch's Suggestion of Immunity even when (as here) the former foreign official has been accused of *jus cogens* violations in a civil suit. *Id.* at 13-15. The Court explained that when "[t]he United States—through the State Department and the Department of Justice—file[s] a Statement of Interest in the district court specifically recognizing [a defendant's] entitlement to immunity and urging that [plaintiffs'] suit 'be dismissed on immunity grounds,' " the defendant is "immune from suit." *Ibid.*

B. Plaintiffs argue that the district court should have permitted them to amend their complaint. If permitted to do so, plaintiffs state that they would add allegations about Zedillo's direct involvement in *jus cogens* violations and about the legality, under Mexican law, of the Mexican government's request for immunity. They assert that these allegations would undermine the stated bases of the Executive Branch's Suggestion of Immunity.

1. Plaintiffs offer no authority for this position, that they be allowed to amend their complaint after the court has ruled, in an effort to have the State Department consider the question of immunity further. Once the Executive Branch has determined that a foreign official is immune from suit, that determination stands unless the Executive decides to reconsider it. See, *e.g.*, *Dichter*, 563 F.3d at 13-15. The Executive Branch is not required to issue repeated affirmations of the Suggestion in response to additional factual allegations. See *Samantar*, 130 S. Ct. at 2284-2285 (Once the Executive Branch makes a suggestion of immunity, "the district court surrender[s] its jurisdiction"); *Hoffman*, 324 U.S. at 34-36 ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow."); *Ex Parte Peru*, 318 U.S. at 587-589 ("[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.") (internal

quotation marks omitted); *Isbrandtsen Tankers, Inc.*, 446 F.2d at 1201 ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

A district court would not be free to set aside a Suggestion of Immunity simply because a plaintiff had filed an amendment to his complaint. Nor, by presenting facts to the court and positing that the State Department did not consider those facts, can a plaintiff "vitiate the degree of deference that should be afforded the suggestion" (Pl. Br. 39). See *Samantar*, 130 S. Ct. at 2284-2285; *Hoffman*, 324 U.S. at 34-36; *Ex Parte Peru*, 318 U.S. at 587-589; *Dichter*, 563 F.3d at 13-15; *Isbrandtsen Tankers, Inc.*, 446 F.2d at 1201. Further, because the Executive's determination is entitled to absolute deference, it is not for courts to decide, in a case in which the Executive has filed a Suggestion of Immunity, that new allegations might affect the Executive's determination. If the Executive decides that developments subsequent to its immunity determination warrant further consideration, the government may so inform the court.

The need for that rule is underscored by the fact that the Executive's immunity determination reflects the application of customary international law principles recognized by the Executive Branch to the circumstances of the case. The Executive may consider, among other things, nonpublic information, such as information gleaned through intelligence sources or diplomatic communications. Thus, while a Suggestion of Immunity may explain the Executive Branch's principal reasoning in recognizing or not recognizing immunity, it does not necessarily disclose every piece of information on which the Executive relied.

If a plaintiff believes that the Executive Branch lacks necessary information, he may communicate that information to the State Department. But communications with the Executive Branch need not occur through amended complaints. And a plaintiff cannot demand that the Executive Branch make repeated affirmations of its immunity determination in response to serial complaints.

In short, a Suggestion of Immunity cannot be nullified by an amendment to a complaint. If a plaintiff believes that the Executive Branch lacks necessary information, he may communicate that information to the Executive Branch. And only if the Executive Branch withdraws or alters its Suggestion may the case proceed.

2. Even if plaintiffs here could properly demand that this Court analyze whether the additional allegations would bear on the Executive Branch's immunity determination (which they cannot), there would be no basis for concluding that the Executive Branch would withdraw its Suggestion and that the outcome of the case would be any different.

The circumstances that the plaintiffs argue undermine the immunity determination—arguments about the legality of Mexico's request and new allegations that Zedillo was directly involved in the massacre—were presented to the district court before the Executive Branch informed the court that it would not participate in oral argument and instead "rest[ed] on its Suggestion of Immunity," A 678.

Moreover, before the Executive Branch filed the Suggestion of Immunity, plaintiffs also provided the State Department and Department of Justice with substantially the same information that they now wish to place in an amended complaint. That information includes the same declarations about the Acteal massacre on which plaintiffs say they would base the amendments to their complaint, see Pl. Br. 35-36, as well as other materials about that event. Likewise, plaintiffs' counsel communicated to the State Department their theory that the Mexican Ambassador's request for immunity violated Mexican law, including the "Opinion [of] Attorney Lopez Padilla" that they reference in their brief. See Pl. Br. 33-34. The Executive

Branch was thus aware of the material that plaintiffs state they would include in an amended complaint when it made a Suggestion of Immunity and as the litigation proceeded to dismissal.

Although the Statement of Interest filed in district court referred primarily to the publicly-filed complaint, it does not follow that the Executive Branch "considered solely" (Pl. Br. 37) Mexico's request and the exact language of plaintiffs' complaint. And there is no basis for concluding that had that additional information been formally placed into the district court record, the Executive Branch would have rescinded its determination.

* * * *

3. Immunity from Testimony of Former Israeli Official: *Wultz v. Bank of China*

On July 21, 2014, a district court judge in the Southern District of New York issued an opinion and order granting a motion brought by the State of Israel to quash the subpoena of Uzi Shaya, a former Israeli government official. *Wultz v. Bank of China*, No. 11-1266 (S.D.N.Y. 2014). The United States did not participate in the court's consideration of the motion. The court applied the reasoning in *Samantar* and *Giraldo v. Drummond* (discussed in *Digest 2012* at 326-31) to determine that Shaya is immune from testifying as to information regarding acts taken or knowledge obtained in his official capacity as a government official. Excerpts follow from the opinion and order of the court (with some footnotes omitted).

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This suit arises out of the death of Daniel Wultz and the injuries of Yekutiel Wultz, suffered in a 2006 suicide bombing in Tel Aviv, Israel. Four members of the Wultz family brought suit against Bank of China ("BOC"), alleging acts of international terrorism under the Antiterrorism Act ("ATA"), among other claims.

…. Plaintiffs' only remaining claim against BOC is for acts of international terrorism under the ATA, based on BOC allegedly having provided material support and resources to a terrorist organization.

…Before this Court is a motion filed by nonparty the State of Israel ("Israel") to quash a deposition subpoena served on Uzi Shaya, a former Israeli national security officer. Israel argues that the subpoena should be quashed because it (1) violates Israel's sovereign immunity, (2) seeks sensitive national security information that constitutes foreign state secrets, and (3) contravenes Federal Rule of Civil Procedure 45. For the following reasons, Israel's motion is GRANTED.

* * * *

…Shaya was an official in Israel's National Security Council working with the Interagency Task Force for Combating Terrorist Financing and Financing of State Sponsors of Terrorism ("Task Force"). The Task Force worked to prevent terrorism by preventing the flow of funds to terrorist organizations. According to Plaintiffs, the Task Force learned in 2004 of a terrorist financing cell involving BOC. …

In 2005, Shaya and other members of the Task Force met with representatives of the People's Bank of China—BOC's chief regulator—to inform them that [accounts] were being used to finance [terrorist organizations including the Palestinian Islamic Jihad ("PIJ"),and] asked the Chinese representatives to close the [accounts]. The Chinese representatives declined to do so. One year later, on April 17, 2006, PIJ operatives executed a suicide bombing that killed Daniel Wultz and seriously injured Yekutiel Wultz.

* * * *

B. Foreign Official Immunity

In *Samantar v. Yousuf*, the United States Supreme Court clarified that the Foreign Sovereign Immunities Act ("FSIA") governs determinations of sovereign immunity for foreign states, but not for foreign officials. The Court explained that when Congress enacted the FSIA, it did not intend to "eliminate[ ] the State Department's role in determinations regarding individual official immunity," a procedure that developed as a matter of common law. In addition, "from the time of the FSIA's enactment [the State Department has] understood the Act to leave intact the Department's role in official immunity cases." Therefore, "[e]ven if a suit [against a foreign official] is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law."

Courts apply a "two-step procedure" to assess common-law claims of foreign sovereign immunity. "Under that procedure, the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department." If the State Department grants the request, "the district court surrender[s] its jurisdiction." But if the State Department declines the request or provides no response, "a district court ha[s] authority to decide for itself whether all the requisites for such immunity exist[]." When deciding for itself, "a district court inquire[s] whether the ground of immunity is one which it is the established policy of the State Department to recognize."

Case law involving immunity of nonparty foreign officials is scarce. But a D.C. District Court recently held—and the D.C. Circuit unanimously affirmed—that nonparty, Alvaro Uribe, a former president of Colombia, could not be deposed even though he was served with a subpoena while visiting the District of Columbia.[54] In that case, the State Department granted a Suggestion of Immunity that "former President Uribe enjoys residual immunity from this Court's jurisdiction insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official." The court agreed that Uribe could not be compelled to testify about "information he received and acts he took in his official capacity as a government official."

[54] See *Giraldo v. Drummond Co., Inc.*, 808 F. Supp. 2d 247, 249 (D.D.C. 2011), aff'd, 493 Fed. App'x 106 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1637 (2013).

The Supreme Court has similarly observed that it "may be correct as a matter of common-law principles" that "foreign sovereign immunity extends to an individual official 'for acts committed in his official capacity.'"[57] As the court in *Giraldo v. Drummond* recognized, this immunity protects non-parties from compelled testimony because "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." Moreover, "[t]he common law of foreign sovereign immunity made no distinction between the time of the commission of official acts and the time of suit."[59] Thus, unlike head-of-state immunity, which is based on status, "immunity based on acts ... does not depend on tenure in office" and is available to officials even after leaving office.[60]

IV. DISCUSSION

A. Israel Has Standing to Challenge the Subpoena

Both Plaintiffs and Intervenors contend that Israel lacks standing to challenge the subpoena because Shaya—the subpoenaed party—has not objected. However, "[t]he basis for recognizing [foreign official immunity] is that 'the acts of[] official representatives of the state are those of the state itself, when exercised within the scope of their delineated powers.'"[62] And as the State Department has asserted, the "immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official."[63] As such, regardless of whether Shaya is willing to testify, Israel has standing to protect its rights and interests.

Moreover, Israel has standing to prevent disclosure of sensitive information that implicates its national security. Under Rule 45, any person or entity—even those not subject to the subpoena—may move to quash a subpoena that "requires disclosure of privileged or other protected matter .... " Here, Israel's National Security Advisor, Yaacov Amidror, declared that the subpoena requires disclosure of "sensitive and classified information" that Shaya learned in his official capacity. In addition, "[a]ny disclosure of such information would implicate the methods and activities used by the State of Israel to prevent terrorism, would harm Israel's national security, would compromise Israel's ability to protect the lives of its citizens, residents, and tourists from terrorism ...."

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[57] *Samantar*, 560 U.S. at 322 n.17 (quoting *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990)). Accord *Rosenberg v. Lashkar-eTaiba*, 980 F. Supp. 2d 336, 342 (E.D.N.Y. 2013) (deferring to the State Department determination that "former [officials of the Government of Pakistan] are entitled to foreign sovereign immunity under the common law as foreign officials who were sued in their official capacity for acts conducted in their official capacity").

[59] *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008). Accord *Yousuf v. Samantar*, 699 F.3d 763, 769 (4th Cir. 2012) (stating that foreign official immunity is "conduct-based immunity that applies to current and former foreign official"); *Giraldo*, 808 F. Supp. 2d at 249 (holding that "'*former* President Uribe enjoys *residual* immunity as to information relating to acts taken or obtained in his official capacity as a government official") (emphasis added).

[60] *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009).

[62] Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousef*, 560 U.S. 305 (2013), 2010 WL 342031, at *12 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)). Accord *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990), aff'd, 946 F.2d 1564 (D.C. Cir. 1991) (recognizing that a foreign sovereign "does not act but through its agents").

[63] Statement of Interest of the United States, *Yousef v. Samantar*, 04 Civ. 1360 (E.D. Va. Feb. 14, 2011) ("*Samantar* SOI"), ¶ 10. Accord *In re Doe*, 860 F .2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders.").

Plaintiffs insist that the subpoena does not "infringe on [Israel's] national security interests." But the D.C. Circuit has "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."[70] Accordingly, I will not second-guess the assessment of the National Security Advisor.

B. Shaya Is Immune from Testifying

On June 12, 2014, Israel requested a Suggestion of Immunity from the State Department. Because the State Department has yet to respond, this Court "ha[s] authority to decide for itself whether all the requisites for such immunity exist[]."[73] In doing so, I must determine "whether the ground of immunity is one which it is the established policy of the State Department to recognize."[74]

The State Department recently defined the contours of immunity for foreign officials in *Giraldo*. There, the plaintiffs, legal representatives of terror victims, served a subpoena on former Colombian President Alvaro Uribe, a nonparty. Plaintiffs sought to depose Uribe regarding information about terrorist activity in Colombia. The State Department granted a Suggestion of Immunity that "former President Uribe enjoys residual immunity from this Court's jurisdiction insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official." The district court adopted the State Department's Suggestion of Immunity, agreeing that Uribe could not be compelled to testify about "information he received and acts he took in his official capacity as a government official." The D.C. Circuit unanimously affirmed.

Plaintiffs argue that *Giraldo* is distinguishable. First, they contend that because Uribe was a former head of state, he was entitled to "far greater immunity than other officials, such as Shaya." But head-of-state immunity was unavailable to Uribe—a former president—because it only applies to sitting heads of state. Instead, the court recognized Uribe's immunity as a former "foreign official." Unlike head-of-state immunity, foreign official immunity "does not depend on tenure in office" and extends to former officials, like Uribe and Shaya.

Second, Plaintiffs argue that the *Giraldo* plaintiffs sought to depose Uribe in order to "challenge the actions of the [Colombian] government." By contrast, their subpoena would not "call into question" the actions of Israel or Shaya. But official immunity operates not only as shield from accusations or claims of wrongdoing. It also offers broad protection from a domestic court's jurisdiction. As the D.C. Circuit has explained, "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits."[88] As such, in *Giraldo*, the court found Uribe to be immune from compelled testimony even though neither he nor Colombia faced any claim of wrongdoing.

Third, Plaintiffs argue that *Giraldo* is distinguishable because Uribe "failed to appear at his deposition and opposed the plaintiffs motion to compel." This is a distinction without a difference because foreign official immunity "ultimately belongs to the sovereign rather than the official." Thus, in *Giraldo*, it was the Colombian Government's "formal[] request[]" for immunity that prompted the State Department to issue its Suggestion of Immunity for Uribe.

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[70] *Center for Nat. Sec. Studies v. US. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (citing *King v. United States Dep't of Justice*, 830 F .2d 210, 217 (D.C. Cir. 1987)).

[73] *Samantar*, 560 U.S. at 311 (citing *Ex parte Peru*, 318 U.S. at 587).

[74] *Id*. at 312 (citing *Hoffman*, 324 U.S. at 36).

[88] *Belhas*, 515 F.3d at 1293 (citing *Foremost-McKesson, Inc.*, 905 F.2d at 443. Accord *Giraldo*, 808 F. Supp. 2d at 150-51 (same as to foreign official immunity).

C. Israel Has Not Waived Immunity

Next, Plaintiffs and Intervenors argue that Israel waived immunity by encouraging Plaintiffs to bring the underlying lawsuits. In the D.C. Circuit,"[e]xplicit waivers of sovereign immunity are narrowly construed 'in favor of the sovereign.'"[93] "[A] foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so."[94] Furthermore, "[t]he theory of implied waiver contains an intentionality requirement, and that a finding of 'an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit.'"[95]

For obvious reasons, sovereigns that wish to waive an official's immunity tend to do so expressly. Here, Plaintiffs cannot—and do not—contend that Israel expressly waived immunity. At most, Plaintiffs suggest that Israel "commit[ted]" to make Shaya available to testify. Intervenors similarly complain that Israel "initially agreed to provide [] access to [] Shaya." But no evidence suggests that Israel intended to waive Shaya's immunity with respect to this Court's jurisdiction. Because I find that Shaya is immune as to information regarding acts taken or knowledge obtained in his official capacity as a government official, I need not determine whether Shaya's testimony is also protected as a foreign state secret.

* * * *

4. *Rosenberg v. Pasha*

In *Rosenberg v. Pasha*, discussed in *Digest 2013* at 286-89 and *Digest 2012* at 293-95 and 331-33, relatives of victims of the 2008 Mumbai terrorist attacks asserted that defendants, the Inter-Services Intelligence Directorate of Pakistan ("ISI") and its former directors, Ahmed Shuja Pasha and Nadeem Taj, were not immune from suit because they engaged in violations of *jus cogens* norms by providing support for acts of terrorism. The lower court dismissed the case as to defendants ISI, Pasha, and Taj based on the U.S. statement of interest and suggestion of immunity. Plaintiffs appealed as to Pasha and Taj and the U.S. Court of Appeals for the Second Circuit affirmed in an August 27, 2014 decision. *Rosenberg v. Pasha et al.*, 577 Fed. App. 22 (2d Cir. 2014). Excerpts follow from the decision of the court of appeals.

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* * * *

Appellants argue that common law sovereign immunity cannot protect foreign officials from suit for *jus cogens* violations, which are "norm[s] accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[93] *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002)(quoting *Library of Cong. v. Shaw*, 4 78 U.S. 310, 318 (1986)).
[94] *Gutch v. Federal Republic of Germany*, 255 Fed. App'x 524, 525 (D.C. Cir. 2007).
[95] *Odhiambo v. Republic of Kenya*, 930 F. Supp. 2d 17, 24 (D.D.C. 2013) (quoting *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994)).

Belhas v. Ya'alon, 515 F.3d 1279, 1286 (D.C.Cir.2008) (quoting *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 714 (9th Cir.1992)). They also argue that formal suggestions of immunity submitted by the State Department should not be dispositive in a court's immunity determination. They base their claim upon the decision of the Fourth Circuit in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir.2012) (*"Samantar III"*), in which the Court of Appeals held that foreign officials "are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity," *id.* at 777, and that Statements of Interest provided by the State Department were given "considerable, but not controlling, weight" in the immunity determination, *id.* at 773.

In so arguing, appellants acknowledge that their position is in tension with the precedent of this Court, expressed in *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir.2009). There, we addressed the question of common law immunity for foreign officials accused of *jus cogens* violations, and explicitly held that "in the common-law context, we defer to the Executive's determination of the scope of immunity" and that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity." *Id.* at 15. However, appellants assert that: (1) we should instead adopt a "cogent litmus test similar to the Fourth Circuit," Appellants' Br. at 14; and (2) our holding in *Matar* was called into question by the Supreme Court's decision in *Samantar v. Yousuf*, 560 U.S. 305, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010) (*"Samantar II"*) (affirming a Fourth Circuit opinion, *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir.2009) (*"Samantar I"*), which held that an individual foreign officer is not protected by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611).

We reject both of these arguments. First, *Matar* was a decision of a panel of this Court. We are bound to follow that precedent, unless and until it is overruled implicitly or expressly by the Supreme Court, or by this Court sitting *in banc*. *See United States v. Santiago*, 268 F.3d 151, 154 (2d Cir.2001). Appellants do not suggest that the *Matar* holding has been overruled by an *in banc* proceeding of this Court, so we turn to the Supreme Court's opinion in *Samantar II*.

We disagree with appellants' assertion that the Supreme Court's opinion in *Samantar II* constitutes intervening Supreme Court precedent that requires us to alter our clear precedent. The question before the Supreme Court in *Samantar II* was whether the Fourth Circuit correctly determined in *Samantar I* that "the [Foreign Sovereign Immunities Act] does not govern [a foreign official's] claim of immunity." *Samantar II*, 560 U.S. at 325, 130 S.Ct. 2278. The Supreme Court's opinion did not address common law immunity in any significant way, and certainly did not overrule—either explicitly or implicitly—our holding in *Matar*. Rather, in affirming the Fourth Circuit, the Supreme Court noted at the end of its opinion that "[w]hether [the foreign official] may be entitled to immunity under the common law ... [is a] matter [ ] to be addressed in the first instance by the District Court on remand." *Id.* at 325–26, 130 S.Ct. 2278.

Upon remand, the Fourth Circuit held in *Samantar III* that common law foreign official immunity did *not* apply to alleged violations of *jus cogens* norms, and the Fourth Circuit's holding there is what appellants ask us to adopt. However, we are bound by our own precedent, not that of the Fourth Circuit, and we conclude that nothing in the Supreme Court's opinion even suggests, let alone mandates, that we abandon our clear precedent in *Matar*. *Matar* remains binding precedent in this Circuit, and in applying it, the District Court correctly determined that, in light of the Statement of Interest filed by the State Department recommending immunity for Pasha and Taj, the action must be dismissed.

* * * *

C. HEAD OF STATE IMMUNITY

1. President Funes of El Salvador

On May 23, 2014, the United States filed a suggestion of immunity on behalf of President Funes of El Salvador in a case brought in state court in Florida. *Rendon v. Funes*, Case No. 2014-2756-CA-01 (11th Cir. Ct. Fla.). The U.S. suggestion of immunity follows (with footnotes omitted) and is also available at *www.state.gov/s/l/c8183.htm*. On May 27, 2014, the court granted defendant's motion to dismiss based on head of state immunity.

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The United States of America, pursuant to 28 U.S.C. § 517, respectfully informs the Court of the interest of the United States in the pending claims against President Carlos Mauricio Funes, the sitting head of state of the Republic of El Salvador, and hereby informs the Court that President Funes is immune from this suit. In support of its interest and determination, the United States sets forth as follows:

1. The United States has an interest in this action because Defendant Funes is the sitting head of a foreign state, thus raising the question of President Funes's immunity from the Court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has sole authority to determine the immunity from suit of sitting heads of state. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize President Funes's immunity from this suit while in office. As discussed below, this determination is controlling and is not subject to judicial review. Thus, no court has ever subjected a sitting head of state to suit once the Executive Branch has determined that he or she is immune.

2. The Office of the Legal Adviser of the U.S. Department of State has informed the Department of Justice that the Embassy of the Republic of El Salvador has formally requested the Government of the United States to determine that President Funes is immune from this lawsuit. The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Mauricio Funes as a sitting head of state from the jurisdiction of the Florida Circuit Court in this suit." Letter from Mary E. McLeod to Stuart Delery (copy attached as Exhibit A).

3. For many years, the immunity of both foreign states and foreign officials was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. *See, e.g., Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the

government has not seen fit to recognize."). In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act, transferring to the courts the responsibility for determining whether a foreign state is subject to suit. 28 U.S.C. §§ 1602 *et seq*.; *see id*. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

4. As the Supreme Court explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010) ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."). Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id*. at 2291 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."). Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity from suit, including the immunity of foreign heads of state and heads of government. *See id*. at 2284–85 & n.6 (noting the Executive Branch's role in determining head of state immunity).

5. The doctrine of head of state immunity is well established in customary international law. *See Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). In the United States, head of state immunity determinations are made by the Department of State, incident to the Executive Branch's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35–36; *Ex parte Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch's immunity determination, declared that such a determination "must be accepted by the courts as a conclusive determination by the political arm of the Government." 318 U.S. at 589. After a Suggestion of Immunity is filed, it is the "court's duty" to surrender jurisdiction. *Id.* at 588. The courts' deference to Executive Branch determinations of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

6. For the same reason, courts also have routinely deferred to the Executive Branch's immunity determinations concerning sitting heads of state. *See Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit . . . as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations." (quotation omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."). When the Executive Branch determines that a sitting head of state is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626 (citing *Spacil*, 489 F.2d at 618). Judicial deference to the Executive Branch in these matters, the Seventh Circuit noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the

conduct of foreign affairs is involved." *Id. See also Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (citing *United States v. Lee*, 106 U.S. 196, 209 (1882))); *Ex parte Peru*, 318 U.S. at 588. As noted above, in no case has a court (state or federal) subjected a sitting head of state to suit after the Executive Branch has determined that the head of state is immune.

7. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's status as the current holder of the office. Because the Executive Branch has determined that President Funes, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts, President Funes is entitled to immunity from the jurisdiction of this Court over this suit.

* * * *

2. Prime Minister Lee of Singapore

The United States submitted a suggestion of immunity on behalf of Prime Minister Lee Hsien Loong of Singapore on March 14, 2014 in the U.S. District Court for the Northern District of California. *Jibreel v. Hock Seng Chin et al.*, No. 13-3470 (N.D. Cal.). The U.S. suggestion of immunity in *Jibreel* is similar to the suggestion of immunity excerpted above that was submitted on behalf of President Funes. The suggestion of immunity, and the letter attached as Exhibit A from the State Department's Office of the Legal Adviser to the Department of Justice, are available at *www.state.gov/s/l/c8183.htm*. On May 5, 2014, the district court judge issued an order adopting the magistrate judge's report and recommendation dismissing the claims against the prime minister.

3. Prime Minister Modi of India

On October 19, 2014, the United States filed a suggestion of immunity on behalf of Prime Minister Narendra Modi of India, in the U.S. District Court for the Southern District of New York. *American Justice Center v. Modi*, No. 14. Civ. 7780 (S.D.N.Y.).[****] The suggestion of immunity with its attached exhibit and a supplemental brief filed on December 10, 2014 are available at *www.state.gov/s/l/c8183.htm*.

[****] Editor's note: On January 14, 2015, the court dismissed the case on the basis of Prime Minister Modi's immunity.

D. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Consular and Diplomatic Immunity

a. Khobragade Case

On January 29, 2014, the United States submitted to the U.S. District Court for the Southern District of New York a brief and accompanying declaration by Stephen Kerr, attorney-adviser in the Office of the Legal Adviser at the U.S. Department of State, explaining that Devyani Khobragade, a consular officer at the Consulate General of India in New York, did not enjoy immunity from prosecution for the acts at issue. Dr. Khobragade had been arrested in 2013 and charged by U.S. authorities with committing visa fraud and providing false statements in order to obtain a visa for Sangeeta Richard to work for Dr. Khobragade in New York. Excerpts follow from Mr. Kerr's declaration. The declaration in its entirety is available at *www.state.gov/s/l/c8183.htm*.

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For the reasons summarized below, Devyani Khobragade does not currently enjoy immunity from criminal prosecution for the crimes with which she is charged in the indictment captioned *United States v. Devyani Khobragade*, 14 Cr. 008 (SAS) (the "Indictment"). In addition, Dr. Khobragade did not enjoy immunity from arrest or detention at the time of her arrest on felony criminal charges of visa fraud and false statements on December 12, 2013.

3. The records of the Department of State reflect that on December 12, 2013, Devyani Khobragade was registered as Deputy Consul General at the Consulate General of India at New York, New York, a position she held from October 26, 2012, until her duties were terminated on January 8, 2014. In that capacity, she enjoyed "immunity from the jurisdiction of the judicial and administrative authorities of the receiving State with respect of acts performed in the exercise of consular functions," pursuant to Article 43(1) of the Vienna Convention on Consular Relations (the ''VCCR"). I understand that Dr. Khobragade submitted an application for an A-3 visa for Ms. Richard, which is a visa for "aliens employed in a domestic or personal capacity by a principal alien, who are paid from the private funds of the principal alien and seek to enter the United States solely for the purpose of such employment." 22 C.F.R. § 41.21(a)(4). The Department of State does not issue an A-3 visa unless the visa applicant has executed a contract with the principal alien documenting the personal employment relationship. Accordingly, Dr. Khobragade did not employ Ms. Richard in her capacity as Deputy Consul General, and thus did not enjoy immunity from prosecution for the crimes for which she was arrested on December 12, 2013.

4. Dr. Khobragade was registered as Counselor at the Permanent Mission of India to the United Nations enjoying privileges and immunities incident to that assignment from only January 8, 2014 to January 9, 2014. In that capacity, Dr. Khobragade enjoyed "immunity from the criminal jurisdiction of the receiving State" pursuant to Article 31(1) of the Vienna Convention on Diplomatic Relations (the "VCDR") incorporated by the reference to "the immunities of diplomatic envoys" in Article V, section 15, of the United Nations Headquarters Agreement. On January 9, 2014, Dr. Khobragade departed the United States and her duties as Counselor at the Permanent Mission of India to the United Nations were terminated. Pursuant to Article 39(2) of the VCDR, "when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so.... However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." Accordingly, from the time of Dr. Khobragade's departure from the United States on January 9, 2014, through the present, Dr. Khobragade enjoys residual diplomatic immunity only for acts she performed in the exercise of her functions as a member of the mission from January 8, 2014 to January 9, 2014. (She does not enjoy immunity for any other acts committed during her time as a member of the mission.) The acts giving rise to the charges in the Indictment were not performed in Dr. Khobragade's exercise of her functions as a member of the mission, both because they were performed well before Dr. Khobragade's assignment to the Permanent Mission of India to the United Nations and because the hiring of Ms. Richard was not an official act. Accordingly, Dr. Khobragade does not presently enjoy immunity from prosecution for the crimes with which she is charged in the Indictment.

5. Dr. Khobragade's motion to dismiss the Indictment asserts that she enjoyed diplomatic immunity on December 12, 2013—the day of her arrest—by virtue of her accreditation to the United Nations as a member of India's delegation to the UN General Assembly ("UNGA") from August 26 to December 31, 2013. That assertion is incorrect.

6. First, there is no basis for the application of section 11 of the Convention on the Privileges and Immunities of the United Nations (the "General Convention") to the present matter, as there is no evidence that Dr. Khobragade was exercising any function related to UN representation at, or immediately before or after, the time of her arrest.

7. Section 11 of the General Convention provides that "[r]epresentatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy [certain listed] privileges and immunities." These include "such other privileges, immunities and facilities ... as diplomatic envoys enjoy," which in tum include immunity from the criminal jurisdiction of the receiving State under Article 31(a) of the VCDR. Section 16 of the General Convention provides that "the expression 'representatives' shall be deemed to include all delegates, deputy delegates, advisers, technical experts, and secretaries of delegations."

8. The United States has consistently interpreted section 11 of the General Convention to provide diplomatic level immunity to those foreign government representatives of the ranks listed in section 16 of the General Convention who travel to the United States for UN business. Dr. Khobragade, however, did not travel from India to New York for business

before the UN; rather, she was accredited to the Department of State's Office of Protocol as a bilateral representative to the United States, specifically as India's Deputy Consul General at the Indian Consulate General in New York City. On that basis the Department of State accorded her the privileges and immunities commensurate with such status and permitted her to continuously reside in New York for a period of time. The Department of State issued her an identification card and tax exemption card, both relating to her status as Deputy Consul General. In short, the Government of India represented her to the Department of State as a consular officer and the Department accepted her in that capacity.

9. Moreover, there is strong support for the general proposition that section 11 of the General Convention was not intended to cover individuals residing in New York as consular officers who are subsequently accredited as a member of a UN delegation. The legislative history of U.S. consideration of the Convention indicates that section 11 was viewed as extending the diplomatic privileges and immunities already enjoyed by resident diplomatic personnel at UN missions under the UN Headquarters Agreement to certain high-level, non-resident representatives to the UN. See, *e.g.*, Exec. Rep. No. 91-17 at 3 (March 17, 1970) ("With regard to representatives of members, currently only resident representatives of permanent missions to the UN have full diplomatic immunities. Nonresident representatives enjoy only functional immunities [under the International Organization Immunities Act]; that is, immunities with respect to their official acts. Under the convention, these nonresident representatives will also be entitled to full diplomatic immunities. The group covered here consists of foreign officials coming to the United Nations for a short time to attend specific meetings—such as the annual fall meetings of the General Assembly. Foreign ministers and other high government officials, distinguished parliamentarians, and representatives of that caliber, fall into this category, which is estimated to number about 1,000 people a year.")

10. Also, the UN requests the dates of arrival and departure from the United States for members of the UN delegations and presents this information, and not dates of business before the UN, to the United States Mission to the UN.

11. In any event, the documentation that Dr. Khobragade presented in support of her motion to dismiss fails to establish that she had Section 11 immunity at the time of her arrest, if she had it at any point in time.

a. First, the "UN accreditation record" that defense counsel attached as exhibit 1 to Defendants' motion to dismiss indicates Dr. Khobragade's date of arrival in the United States as August 26, 2013 and her date of departure as August 31, 2013. Such dates are plainly wrong since she was present in the United States both before and after that date.

b. Second, while Dr. Khobragade's name appears on a list sent to the United States Mission to the United Nations by the UN Office of Protocol on August 26, 2013, as part of the Indian delegation for the main part of the regular session of the 68th UN General Assembly, which took place in September 2013, the dates given for her appear as August 2013-August 2016. Again, those dates are incorrect or meaningless since the 68th General Assembly meeting was not going to extend past December 2013, and the main part of the regular session took place in September 2013.

c. Third, Dr. Khobragade's name does not appear on the consolidated list of UNGA delegation members produced by the UN. That makes sense, because at all times she remained notified to the Department of State's Office of Protocol as Deputy Consul General and no dual-accreditation request was sent to State Department's Office of Protocol.

12. Finally, no information had been brought to my attention indicating that Dr. Khobragade was exercising any functions as a member of the Indian UN delegation at the time of her arrest, or that she was traveling to or from the place of a UN General Assembly meeting. Her motion to dismiss states that she was appointed as a Special Advisor to the UN during the Indian Prime Minister's visit. The Indian Prime Minister's visit concluded in September 2013, close to three months before the arrest.

13. Dr. Khobragade's assertions that she possessed full diplomatic immunity at various times in the past, even if true, are no bar to a current prosecution for past conduct now that such immunity has unquestionably terminated, unless the past conduct for which she is being prosecuted was official in nature. This has been the State Department's formal interpretation of the Vienna Convention on Diplomatic Relations since at least 1984, when the Secretary of State stated the following to all foreign missions in a circular diplomatic note: "On the termination of criminal immunity, the bar to prosecution in the United States would be removed and any serious crime would remain as a matter of record. If a person formerly entitled to privileges and immunities returned to this country and continued to be suspected of a crime, no bar would exist to arresting and prosecuting him or her in the normal manner for a serious crime allegedly committed during the period in which he or she enjoyed immunity. This would be the case unless the crime related to the exercise of official functions, or the statute of limitations for that crime had not imposed a permanent bar to prosecution." Circular Diplomatic Note, March 21, 1984, at 2–3.

14. For all of the foregoing reasons, the Department of State concludes that Dr. Khobragade did not enjoy immunity from arrest or detention at the time of her arrest in this case, and she does not presently enjoy immunity from prosecution for the crimes charged in the Indictment.

* * * *

On March 12, 2014, the district court judge in the case filed an opinion and order, granting Dr. Khobragade's motion to dismiss. Excerpts follow from the court's decision (with footnotes omitted). Dr. Khobragade was subsequently reindicted, and the charges remained pending in early 2015.

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* * * *

It is undisputed that Khobragade acquired full diplomatic immunity at 5:47 PM on January 8, 2014, and did not lose that immunity until her departure from the country on the evening of January 9, 2014. On January 9, immediately following the return of the Indictment, Khobragade appeared before the Court through counsel and moved to dismiss the case. Because the Court lacked jurisdiction over her at that time, and at the time the Indictment was returned, the motion must be granted.

The Government argues that the Indictment should not be dismissed because Khobragade did not have diplomatic immunity at the time of her arrest, and has no immunity at the present time. In support, the Government submits a declaration from Steven Kerr, Attorney-Advisor in the Office of the Legal Advisor of the United States Department of State. Kerr concludes that "Dr. Khobragade did not enjoy immunity from arrest or detention at the time of her arrest in this case, and she does not presently enjoy immunity from prosecution for the crimes charged in the Indictment."

Even assuming Kerr's conclusions to be correct, the case must be dismissed based on Khobragade's conceded immunity on January 9, 2014. The fact that Khobragade lost full diplomatic immunity when she left the country does not cure the lack of jurisdiction when she was indicted. Courts in civil cases have dismissed claims against individuals who had diplomatic immunity at an earlier stage of proceedings, even if they no longer possessed immunity at the time dismissal was sought. These courts reasoned that the lack of jurisdiction at the time of the relevant procedural acts, such as service of process, rendered those acts void. Because Khobragade moved to dismiss on January 9, 2014, the motion must be decided in reference to her diplomatic status on that date.

Similarly, Khobragade's status at the time of her arrest is not determinative. The State Department has explained that "criminal immunity precludes the exercise of jurisdiction by the courts over an individual whether the incident occurred *prior to* or during the period in which such immunity exists." Furthermore, several courts have held that diplomatic immunity acquired during the pendency of proceedings destroys jurisdiction even if the suit was validly commenced before immunity applied. For example, in *Abdulaziz v. Metropolitan Dade County*, the Eleventh Circuit concluded that diplomatic immunity "serves as a defense to suits already commenced." The court found that the "action was properly dismissed when immunity was acquired and the court was so notified." Lower courts have cited and followed *Abdulaziz* in the absence of binding case law in other circuits.

The Court notes that *Abdulaziz* involved civil claims rather than criminal charges. However, the Government has not cited any criminal case in which immunity was acquired after arrest, and the Court is not aware of any such case. *Abdulaziz* is persuasive precedent given that the standard for dismissing criminal and civil cases based on diplomatic immunity is the same. Furthermore, because diplomatic immunity is a jurisdictional bar, it is logical to dismiss proceedings the moment immunity is acquired. Even if Khobragade had no immunity at the time of her arrest and has none now, her acquisition of immunity during the pendency of proceedings mandates dismissal.

The Court has no occasion to decide whether the acts charged in the Indictment constitute "official acts" that would be protected by residual immunity. However, if the acts charged in the Indictment were not "performed in the exercise of official functions," then there is currently no bar to a new indictment against Khobragade. Khobragade concedes that "[t]he prosecution is clearly legally able to seek a new indictment at this time or at some point in the future now that [she] no longer possesses [] diplomatic status and immunity ...." However, the Government may not proceed on an Indictment obtained when Khobragade was immune from the jurisdiction of the Court.

* * * *

b. Nsue Case

On December 11, 2014, the United States filed a brief explaining the Government's position that a defendant in a criminal case being prosecuted in the U.S. District Court for the Eastern District of Virginia did not enjoy immunity from prosecution. *United States v. Nsue*, No. 1:14-CR-312 (E.D. Va. 2014). Defendant, Jesus Monsuy Nsue, was indicted on charges of cash smuggling, failing to file the required report of transporting currency, and false statements. Defendant filed a motion to delay his trial due to unspecified purported immunity. The U.S. brief, excerpted below (with footnotes omitted), explains that Mr. Nsue is not entitled to any form of diplomatic or consular immunity in the United States. The brief, with the referenced attachments, is available at *www.state.gov/s/l/c8183.htm*. On December 18, 2014, the district court issued an order, finding a lack of sufficient evidence of immunity and denying any claim that the indictment should be dismissed on the basis of diplomatic immunity.

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A proceeding or action must be dismissed if it is brought against a person entitled to diplomatic immunity with respect to such action or proceeding. *See* 22 U.S.C. § 254d. In particular, dismissal is required when a defendant enjoys immunity under the Vienna Convention on Diplomatic Relations (VCDR), under Title 22 of the United States Code, or under any other laws extending diplomatic privileges and immunities. *Id*. Immunity may be established upon motion or suggestion by or on behalf of a defendant. *See* 22 U.S.C. § 254d.

The determination whether a person has diplomatic immunity is a mixed question of fact and law. *United States v. Al-Hamdi*, 356 F.3d 564, 569 (4th Cir. 2004). The Fourth Circuit applies a "hybrid standard to mixed questions of law and fact, applying to the factual portion of each inquiry the same standard applied to questions of pure fact and examining *de novo* the legal conclusions derived from those facts." *Id*. (quoting *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 905 (4th Cir.1996)).

As the Supreme Court explained more than a century ago, however, courts "do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister." *In re Baiz*, 135 U.S. 403, 432 (1890). Consistent with that well-settled approach, the Fourth Circuit has held that the State Department's certification is "conclusive evidence as to the diplomatic status of an individual." *Al-Hamdi*, 356 F.3d at 573. Notably, in its leading case on this issue, the Fourth Circuit declined to "review the State Department's factual determination" regarding the information underlying a defendant's assertion of immunity. *Id*. at 573.

ARGUMENT

The defendant is not entitled to any form of diplomatic or consular immunity in the United States, and so the criminal case against him may proceed. Although the United States takes very seriously its obligations to foreign countries and diplomats, defendant's suggestion falls short of any legitimate claim for immunities and privileges. Significantly, defendant has not yet explained the legal basis for his immunity claim. The government's only information about defendant's immunity claim is based on the documents attached to his motion to continue trial and the motion itself, which does not cite any source of law. In fact, his motion for a continuance merely suggests that "a diplomatic process has been started which might lead to a resolution of the situation of Mr. Nsue without the need for a criminal prosecution (perhaps through an administrative or civil remedy)." Deft's Emergency Motion to Continue Trial Date at 2 (Dkt.40). But the United States Department of State has determined that the "defendant does not enjoy any form of diplomatic or consular immunity, and that the Department of State is not aware of a basis for any other immunity from prosecution in this case." *See* Attachment A (Declaration of Chenobia C. Calhoun at ¶ 8). The State Department has communicated this conclusion to the Embassy of Equatorial Guinea. *Id*. As such, it is not clear at this point what the defendant hopes to obtain through any "diplomatic process."

In any event, the State Department has certified that the defendant is not entitled to any form of immunity. *See id*. at ¶ 3 ("I certify that defendant is not entitled to any form of diplomatic or consular immunity in the United States."). That determination, in itself, "conclusively" establishes that the defendant is not entitled to immunity. *See Al-Hamdi*, 356 F.3d at 573. Accordingly, the trial currently scheduled for January 26, 2014, should proceed without any further delay.

* * * *

2. Determinations under the Foreign Missions Act

On March 9, 2014, the Under Secretary for Management, U.S. Department of State, determined that the Taipei Economic and Cultural Representative Office in the United States ("TECRO"), including its real property and personnel, is a ''foreign mission'' within the meaning of section 202(a)(3) of the Foreign Missions Act (22 U.S.C. 4302(a)(3)) and therefore eligible to be designated for certain benefits under the Act. 79 Fed. Reg. 16,090 (Mar. 24, 2014). Excerpts follow from the Federal Register notice regarding the designation and determination of TECRO's status under the Act. See *Digest 2013* at 292 for a discussion of the agreement on privileges, exemptions, and immunities signed by the American Institute in Taiwan ("AIT") and TECRO in 2013.

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* * * *

After due consideration of the benefits, privileges, and immunities provided to AIT, as well as matters related to the protection of the interests of the United States, on the basis of reciprocity between AIT and TECRO, I hereby designate the following as benefits for purposes of the Act:
• For TECRO designated employees, exemption from all taxes and dues imposed by state, county, municipality and territorial authorities in the United States in connection with the ownership or operation of a motor vehicle;
• For qualifying dependents of a TECRO designated employee, exemption from state, county, municipality and territorial sales or other similarly imposed consumption taxes in the United States, except those normally included in the price of goods and services, or charges for specific services rendered; and
• Exemption from state, county, municipal and territorial taxes in the United States ("real estate taxes")—including, but not limited to, annual property tax, recordation tax, transfer tax, and the functional equivalent of deed registration charges and stamp duties—on the basis of real property's authorized use for the performance of TECRO's authorized functions and for which TECRO would otherwise be liable.

For purposes of this determination, the term "TECRO designated employees" means persons duly notified to and accepted by AIT as designated employees of TECRO at its primary office or one of its subsidiary offices, including the heads of such offices. It shall not apply with respect to any person who is a national of, or is
permanently resident in, the United States.

* * * *

3. Protection of Diplomatic and Consular Missions and Representatives

Excerpted below are remarks by Mark Simonoff, Minister Counselor for Legal Affairs for the U.S. mission to the UN, at the UN General Assembly's Sixth Committee during the Committee's consideration of the topic of protecting the security and safety of diplomatic and consular missions and representatives, delivered on October 21, 2014. Mr. Simonoff's remarks are available in full at *http://usun.state.gov/briefing/statements/233216.htm*.

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* * * *

Thank you, Mr. Chairman. The rules protecting the sanctity of ambassadors, other diplomats, and consular officials enable them to carry out their vital functions. Respect for these rules is a basic prerequisite for the normal conduct of relations among states.

Rules providing protections for diplomats have a long and deep history. …

While the rules are old and a common substantive core has characterized them, the facts and circumstances of attacks on diplomatic and consular officials have changed. Indeed, in recent years, such attacks have increased in number, more often involving non-state armed groups, and have become if anything more brazen. Just this summer, the United States temporarily relocated all of our personnel out of Libya due to the ongoing violence resulting from clashes between Libyan militias. Earlier, on February 1, 2013, the U.S. Embassy in Ankara,

Turkey was attacked. And in April 2013, a U.S. Foreign Service officer—along with members of our military service—was killed by an improvised explosive device attack in Zabul Province, Afghanistan. These are just two of the over 200 attacks against U.S. diplomatic facilities and personnel in the last 10 years, which resulted in the deaths of over 40 personnel, including U.S. Ambassador to Libya Chris Stevens and three other Americans in September 2012. Nor is the United States alone in this regard.

These brutal acts by armed groups should be universally condemned.

The Convention on Internationally Protected Persons was adopted by the General Assembly in 1973, and has 176 UN States parties. This Convention, which requires the punishment of violent attacks against foreign government officials, including diplomats and consular officials, also requires States Parties to prevent the commission of such crimes, including the exchanging of information and other coordination. Since 1980, the General Assembly has been adopting resolutions condemning acts of violence against diplomatic and consular missions and representatives. We look forward to discussion of another such resolution this year, to reemphasize the importance of these issues. But the 2012 resolution also stressed practical measures to prevent violence against diplomatic and consular missions and representatives. And, indeed, prevention is a critical element of the obligation of receiving states. The steps that are appropriate to protect a mission, and that are therefore required of the receiving state, will depend on the potential threats to a particular mission in that state. Thus, as the facts and circumstances of attacks on diplomatic and consular personnel continue to change, so too must our preventive measures. For our part, we place an emphasis on enhanced security training and good personal security practices to help mitigate the risks our personnel face every day. But prevention is also facilitated by collaboration. Thus, our embassies overseas often work with local law enforcement and other authorities to prepare for eventualities, for instance by conducting drills and sharing information when appropriate.

* * * *

E. INTERNATIONAL ORGANIZATIONS

Georges v. United Nations

On March 7, 2014, the United States submitted a statement of interest regarding the immunity of the United Nations and UN officials in a lawsuit brought relating to a cholera outbreak in Haiti. Excerpts follow (with footnotes omitted) from the U.S. statement of interest, which is available in full at *www.state.gov/s/l/c8183.htm*.[*]

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[*] Editor's note: The Court dismissed the case in January 2015 on the basis of the immunity asserted in the U.S. statement of interest.

[A]ll of the defendants in this matter are immune from legal process and suit. The UN, including its integral component, defendant the United Nations Stabilization Mission in Haiti ("MINUSTAH"), is absolutely immune from legal process and suit absent an express waiver, pursuant to the Charter of the United Nations ("UN Charter"), June 26, 1945, 59 Stat. 1031, TS 993, 3 Bevans 1153, and the Convention on the Privileges and Immunities of the United Nations ("General Convention"), adopted Feb. 13, 1946,21 U.S.T. 1418, 1 U.N.T.S. 16. In this case, the UN, including MINUSTAH, has not waived its immunity from legal process and suit, and instead has repeatedly and expressly asserted its absolute immunity. Defendants Ban Ki-Moon, the Secretary-General of the UN ("Secretary-General Ban"), and Edmond Mulet, former Under-Secretary-General for the United Nations Stabilization Mission in Haiti and current Assistant Secretary-General for UN Peacekeeping Operations ("Assistant Secretary-General Mulet"), are similarly immune from legal process and suit, pursuant to the UN Charter, the General Convention, and the Vienna Convention on Diplomatic Relations ("Vienna Convention"), 23 U.S.T. 3227, TIAS No. 7502, 500 UNTS 95.

In light of each defendant's immunity, the Court lacks subject matter jurisdiction over this matter, and this action should be dismissed. *See Brzak v. United Nations,* 551 F. Supp. 2d 313,318 (S.D.N.Y. 2008), *aff'd,* 597 F.3d 107 (2d Cir. 2010); *see also* Fed. R. Civ. P. 12(h)(3). Further, because each defendant's immunity encompasses immunity from service of process, plaintiffs' attempted service on defendants was ineffective.

BACKGROUND

A. The Complaint

Plaintiffs allege that the UN, MINUSTAH, Secretary-General Ban and Assistant Secretary-General Mulet are responsible for an epidemic of cholera that broke out in Haiti in 2010, killing approximately 8,000 Haitians and injuring approximately 600,000 more. *See* Complaint, dated October 9, 2014, at 1-2. Specifically, plaintiffs allege that the UN failed to screen and immunize Nepalese peacekeepers who were deployed to Haiti from Nepal, which had recently experienced a surge in cholera infections. *See id.* at 5. …

Plaintiffs allege that "Ban Ki-moon is and was at all relevant times the Secretary-General of the UN" and had "overall responsibility for the management of the UN and its operations, including all operations in Haiti." *Id.* at 21. Plaintiffs allege that the Secretary-General also appointed and oversaw defendant Mulet in his capacity as Special Representative of the Secretary General. *See id.* Plaintiffs further allege that "Mulet had 'overall authority on the ground for the coordination and conduct of all activities of the United Nations agencies, funds and programmes in Haiti.'" *Id.* at 22 (quoting UN Security Council Resolution 1542, which established MINUSTAH). Plaintiffs allege that both individuals "knew or reasonably should have known that hazardous conditions or activities under [their] authority or control could injure Plaintiffs, and [they] negligently failed to take or order appropriate action to avoid the harm." *Id.* at 21-22.

In addition, plaintiffs allege that the UN has failed to establish a "standing claims commission" to address third-party claims of individuals injured by the cholera epidemic, in violation of the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti ("Status of Forces Agreement"). …

The named plaintiffs are Haitian and United States citizens who allege that they either have been personally injured by the cholera epidemic or are the personal representatives of those who have died as a result of it. *See id.* at 10, 30. Plaintiffs bring this action on behalf of

themselves and a class of all other persons who have been or will be personally injured by the cholera outbreak, and personal representatives of those who have died or will die from the cholera outbreak. *See id.* at 29-30.

B. Procedural History

Plaintiffs now seek an order confirming that service of process on the UN has been perfected, or alternatively an order providing for service of process on the UN by other means.

…

The United States makes this submission pursuant to 28 U.S.C. § 517, consistent with the United States' obligations as host nation to the UN and as a party to treaties governing the privileges and immunities of the UN.

DISCUSSION

A. The UN Enjoys Absolute Immunity

1. The UN's Immunity

The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment [sic] of its purposes." UN Charter, art. 105, § 1. The UN's General Convention, which the UN adopted shortly after the UN Charter, defines the UN's privileges and immunities, and specifically provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2.

As courts in this district have long recognized, the United States is a party to both the UN Charter and the General Convention. *See, e.g., Brazk,* 597 F.3d at 111; *Sadikoglu v. United Nations Development Programme,* No. 11 Civ. 0294(PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011) ("[t]he scope of immunity for the UN and its subsidiary bodies derives primarily from two multilateral agreements to which the United States is a party: the Charter of the United Nations . . . and the Convention on Privileges and Immunities of the United Nations"); *Askir v. Boutros-Ghali,* 933 F. Supp. 368, 371 (S.D.N.Y. 1996). The United States understands the General Convention, Article II section 2, to mean what it unambiguously says: the UN enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity.

To the extent there could be any alternative reading of the General Convention's text, the Court should defer to the Executive Branch's interpretation. *See Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Tachiona v. United States,* 386 F.3d 205, 216 (2d Cir. 2004) (interpreting the General Convention and noting, "in construing treaty language, '[r]espect is ordinarily due the reasonable views of the Executive Branch"') (quoting *El AI Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 168, 576 (1999)).

Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views are entitled to deference. The Executive Branch's interpretation should be given particular deference in this case because the interpretation is shared by the UN. *See* Letters dated December 20, 2013, and February 10, 2014, from Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Samantha Power, Permanent Representative of the United States to the United Nations, annexed hereto as Exhibits 1 and 2, respectively (stating that, *inter alia,* the UN, including MINUSTAH, is entitled to immunity from suit pursuant to the

UN Charter and the General Convention); *see also, e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (where parties to a treaty agree on meaning of treaty provision, and interpretation "follows from the clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation").

Consistent with the applicable treaty language and the Executive Branch's and the UN's views, courts repeatedly, and indeed to the United States' knowledge uniformly, have recognized that "[u]nder the Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases." *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987); *see also, e.g., Askir*, 933 F. Supp. at 371. Controlling Second Circuit authority recognizes the UN's absolute immunity. *See Brzak*, 597 F.3d at 112 ("The United Nations enjoys absolute immunity from suit unless 'it has expressly waived its immunity"'). As the *Brzak* district court held, "where, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction." *Brzak*, 551 F. Supp. 2d at 318.

MINUSTAH, as a subsidiary organ of the UN, enjoys this same absolute immunity. MINUSTAH is a UN peacekeeping mission that reports directly to the Secretary-General, and is therefore an integral part of the UN. *See* United Nations: Structure and Organization, *http://www.un.org/en/aboutun/structure/* (last visited February 21, 2014)…. Indeed, the Status of Forces Agreement explicitly provides that MINUSTAH "shall enjoy the privileges and immunities . . . provided for in the [General] Convention." Status of Forces Agreement, art. III, § 3. Accordingly, MINUSTAH is entitled to the immunities established by the UN Charter and General Convention. *See, e.g., Emmanuel v. United States*, 253 F.3d 755, 756 (1st Cir. 2001) (noting that Article II immunity under the General Convention applies to the UN Mission in Haiti pursuant to the applicable Status of Forces Agreement); *see also Sadikoglu*, 2011 WL 4953994, at *3 (finding that "because [defendant UN Development Programme]—as a subsidiary program of the UN that reports directly to the General Assembly—has not waived its immunity, 'the [General Convention] mandates dismissal of Plaintiff['s] claims against the United Nations for lack of subject matter jurisdiction'" (quoting *Brzak*, 551 F. Supp. 2d at 318))….

Therefore, absent an express waiver, the UN, including MINUSTAH, enjoys absolute immunity from suit, and this action should be dismissed as against the UN for lack of subject matter jurisdiction. *See Brzak*, 551 F. Supp. 2d at 318.

2. The UN Has Not Waived Its Immunity

To the extent plaintiffs argue that the UN, including MINUSTAH, has waived its immunity in this case because it has not established a venue for plaintiffs to pursue legal remedies, *see, e.g.*, Complaint at 172-83 (asserting that, by failing to provide procedures by which injured parties can make claims for compensation, the UN has "refus[ed] to comply with its legal obligations," and that "[p]ursuing this action in a court of law is the only option left for Plaintiffs . . . to seek enforcement of their right to a remedy"), such an argument should be rejected because the UN has repeatedly and expressly asserted its absolute immunity.

Whether the UN has established a claims commission or other means by which aggrieved persons can seek compensation is irrelevant to the question of waiver. As established by the General Convention, any waiver of the UN's absolute immunity from suit or legal process must be "express[]." General Convention, art. II, § 2; *see also Brzak*, 597

F.3d at 112 ("Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention].").

In this case, there has been no express waiver. To the contrary, the UN has repeatedly asserted its immunity. On December 20, 2013, Miguel de Serpa Soares, the United Nations Legal Counsel, wrote to Samantha Power, Permanent Representative of the United States to the United Nations, stating: "I hereby respectfully wish to inform you that the United Nations has not waived and is expressly maintaining its immunity with respect to the claims in [the instant] Complaint." Exhibit 1 at 2 …. The UN reasserted its absolute immunity on February 10, 2014. *See* Exhibit 2 at 2 ("The United Nations has not waived its immunity in the present case."); *id.* ("reaffirm[ing] that the United Nations continues to maintain its immunity and the immunity of its officials in connection with this matter"). The UN has requested that the United States advise the Court of its immunity and that of its officials and take steps to ensure that these immunities are protected. *See id.* ("request[ing] that the relevant United States authorities inform the Court that the United Nations maintains its immunity in respect [to this matter]"); *id.* ("further request[ing] that the relevant United States authorities take the necessary steps to ensure that the immunity of the United Nations and its officials is respected").

Accordingly, because the UN has not waived its immunity in this case, the UN, including MINUSTAH, enjoys absolute immunity from suit, and this action should be dismissed as against the UN for lack of subject matter jurisdiction.

B. Secretary-General Ban and Assistant Secretary-General Mulet Enjoy Immunity

The UN Charter, the General Convention and the Vienna Convention also provide immunity from legal process and suit for UN officials such as Secretary-General Ban and Assistant Secretary-General Mulet.

The UN Charter provides that "officials of the Organization shall … enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion [sic] of the organization." UN Charter, art. 105, § 2. In addition, Article V, Section 19 of the General Convention specifically provides that "the Secretary-General and all Assistant Secretaries-General shall be accorded … the privileges and immunities … accorded to diplomatic envoys, in accordance with international law." *Id.*, art. V, § 19.

In the United States, the privileges and immunities enjoyed by diplomats are governed by the Vienna Convention, which entered into force with respect to the United States in 1972. 23 U.S.T. 3227, TIAS No. 7502, 500 U.N.T.S. 95. Article 31 of the Vienna Convention provides that diplomatic agents "enjoy immunity from the civil and administrative jurisdiction" of the receiving State—here, the United States—except with respect to: (a) privately-owned real estate; (b) performance in a private capacity as an executor, administrator, heir or legatee; and (c) professional or commercial activities other than official functions. *See id.* at art. 31. As this Court has noted, the purpose of diplomatic immunity under the Vienna Convention is "to protect the interests of comity and diplomacy among nations …." *Devi v. Silva*, 861 F. Supp. 2d 135, 142-43 (S.D.N.Y. 2012). Federal courts, including the Second Circuit, repeatedly have recognized the immunity of United Nations officials pursuant to the General Convention and the Vienna Convention. *See, e.g., Brzak*, 597 F.3d at 113 (noting that, under the Vienna Convention, "current diplomatic envoys enjoy absolute immunity from civil and criminal process").

Moreover, Article V, Section 18(a) of the General Convention provides that UN officials are "exempt from legal process in respect of words spoken or written and all acts performed by them in their official capacity ...." General Convention, art. V, § 18(a). Under this provision, both current and former UN officials, regardless of rank, enjoy immunity from suit for all acts performed in their official capacity. *See Van Aggelen v. United Nations,* 311 F. App'x 407, 409 (2d Cir. Feb. 20, 2009) (applying this immunity to a UN official who did not enjoy diplomatic immunity); *McGehee v. Albright,* 210 F. Supp. 2d 210, 218 n.7 (S.D.N.Y. 1999) (applying this immunity to then-Secretary-General Annan), *aff'd,* 208 F.3d 203 (2d Cir. 2000); *see also DeLuca v. United Nations Org.,* 841 F. Supp. 531, 534 (S.D.N.Y. 1994) (recognizing former high-level UN officials as entitled to immunity), *aff'd,* 41 F.3d 1502 (2d Cir. 1994); *Askir,* 933 F. Supp. at 371 (dismissing complaint against UN official for lack of subject matter jurisdiction because he was immune from suit under the General Convention).

Because none of the three exceptions outlined in the Vienna Convention is relevant in the instant case, and because the UN has expressly asserted the immunity of Secretary-General Ban and Assistant Secretary-General Mulet in this matter, Secretary-General Ban and Assistant Secretary-General Mulet enjoy immunity from suit, and this action should be dismissed as against them for lack of subject matter jurisdiction.

C. Because All Defendants Are Immune, Plaintiffs' Attempted Service Was Ineffective

Consistent with its absolute immunity, the UN, including MINUSTAH, is also immune from service of legal process. *See* General Convention, art. II, § 2 (the UN "shall enjoy immunity from every form of legal process"); Status of Forces Agreement, art. III, § 3 (stating that MINUSTAH "shall enjoy the privileges and immunities ... provided for in the [General] Convention," which include immunity "from any form of legal process"). In addition, the General Convention specifically provides that the "premises of the United Nations shall be inviolable." *Id.,* art. II, § 3. Moreover, the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations ("Headquarters Agreement"), June 26, 1947,61 Stat. 3416, 11 U.N.T.S. 11 (entered into force Oct. 21, 1947), art. III, § 9(a), provides that "service of legal process ... may take place within the headquarters district only with the consent of and under conditions approved by the [UN] Secretary-General." And pursuant to the Headquarters Agreement, "the Secretary-General of the United Nations has not prescribed any conditions under which service by mail or facsimile would be allowed." Exhibit 2 at 2. Accordingly, plaintiffs' attempts to serve the UN, including MINUSTAH, in New York, and their attempts to serve MINUSTAH in Haiti, *see* Docket Nos. 5 and 8, were ineffective. Moreover, any attempt at an alternative method of service, including by publication, would likewise be ineffectual.

For similar reasons, plaintiffs' attempts to serve Secretary-General Ban and Assistant Secretary-General Mulet at UN headquarters, *see* Docket Nos. 7 and 9, were ineffective. *See* General Convention, art. II; Headquarters Agreement, art. III, § 9(a); Exhibit 2 at 2. Moreover, the General Convention specifically provides that "[t]he person of a diplomatic agent shall be inviolable," and that the "private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission." General Convention, art. 29, 30; *see also* Vienna Convention, art. 22 ("The premises of the mission shall be inviolable."). Accordingly, plaintiffs' attempts to serve Secretary- General Ban and Assistant Secretary-General Mulet by delivering mail to, or leaving process at, their residences, *see* Docket Nos. 7

and 9, were ineffective. Plaintiffs have therefore failed to effect service on Secretary-General Ban and Assistant Secretary- General Mulet, in light of their diplomatic immunity, the inviolability of the UN headquarters district, and the inviolability of the premises of the UN.

* * * *

On July 7, 2014, the United States submitted a further letter in support of its statement of interest. Excerpts follow (with most footnotes omitted) from the letter, which is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

A. The Immunity of the UN and Its Officials Is Absolute and Unaffected by Any Alleged Breach of the General Convention or SOFA

Plaintiffs' argument that the UN's immunity from suit under the General Convention is conditioned on providing a mechanism to resolve Plaintiffs' tort claims is erroneous. Nothing in the General Convention, or in the Status of Forces Agreement between the UN and the Government of Haiti ("SOFA"), suggests that the UN's immunity is conditional. To the contrary, as reflected by the text and drafting history of the General Convention, and as confirmed by every court to have considered the issue, the UN's immunity is absolute.

The Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views on the General Convention are entitled to deference. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004). Such deference is particularly warranted where, as here, the Government's views are shared by the UN. *See … e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). Because the Government's interpretation is supported by the General Convention's text and drafting history, as well as the courts (*see infra*, Points A.2-3), the Government's views are reasonable and accordingly entitled to "great weight." *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366, 399 (2d Cir. 2004) ("The government's interpretation of Article 17 is faithful to the Warsaw Convention's text, negotiating history, purposes, and the judicial decisions of sister Convention signatories; as such, we ascribe 'great weight' to the government's views concerning the meaning of that provision.") (citation omitted); *see also Fund for Animals v. Norton*, 365 F. Supp. 2d 394, 414 (S.D.N.Y. 2005) (when "faced with two opposing constructions," granting deference to Executive Branch's interpretation of a treaty which was consistent with language and history of the treaty), *aff'd*, 538 F.3d 124 (2d Cir. 2008). The Court should therefore conclude that the UN's immunity from suit bars this action.

1. The Text of the General Convention Requires That A Waiver of Immunity Must Be Express

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506 (2008). The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment [sic] of its purposes." UN Charter, art. 105, § 1. The UN's General Convention, which the UN adopted shortly after the UN Charter, defines the UN's privileges and immunities, and specifically provides that "[t]he United Nations, its property and assets wherever located and by

whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has *expressly waived* its immunity." General Convention, art. II, § 2 (emphasis added). The SOFA similarly provides that MINUSTAH "shall enjoy the privileges and immunities . . . provided for in the [General Convention]." SOFA, art. III, § 3.

The Second Circuit and other courts have uniformly construed the General Convention to mean exactly what the text states: any waiver of the UN's immunity must be express. *See, e.g.*, *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010) ("The United Nations enjoys absolute immunity from suit unless 'it has expressly waived its immunity.'") (citation omitted); *Emmanuel v. United States*, 253 F.3d 755, 756 n.2 (1st Cir. 2001) ("United Nations immunity is absolute unless expressly waived.")….

Plaintiffs' position that the UN's immunity under Section 2 is conditional on its providing appropriate modes of settling disputes of a private law character under Section 29 is contrary to the plain language of the General Convention, which provides that the UN "shall enjoy absolute immunity from every form of legal process *except* insofar as in any particular case it has expressly waived its immunity." General Convention § 2 (emphasis added). The word "except" is followed by a category of one: express waiver. The UN's obligation to provide for dispute resolution mechanisms for claims by third parties against it under Section 29(a) is not included in the category of the exceptions to immunity. Plaintiffs argue, in effect, that such an exception should exist, but the text of the General Convention makes clear that it does not.

Nor has there been an express waiver by the UN of its immunity in this case. An express waiver of immunity "requires a clear and unambiguous manifestation of the intent to waive." *United States v. Chalmers*, 05 Cr. 59 (DC), 2007 WL 624063, at *2 (S.D.N.Y. Feb. 26, 2007); *see also Baley v. United Nations*, No. 97-9495, 1998 WL 536759, at *1 (2d Cir. June 29, 1998) (affirming dismissal where the UN "informed this Court by letter that it has not waived its immunity from suit" and plaintiff "presented no evidence of such a waiver"); … *Klyumel v. United Nations*, No. 92 Civ. 4231 (PKL), 1992 WL 447314, at *1 n.1 (S.D.N.Y. Dec. 4, 1992) ("There is no allegation in the complaint of any express waiver in the instant case, and the [UN's] rejection of attempted service on two occasions would appear to 'manifest [ ] an intent not to waive immunity in this particular instance.'") (citation omitted). As the D.C. Circuit has observed, "[t]he requirement of an express waiver suggests that courts should be reluctant to find that an international organization has inadvertently waived immunity when the organization might be subjected to a class of suits which would interfere with its functions." *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983).

* * * *

2. The UN Has Not Expressly Waived, But Rather Has Expressly Asserted, Its Immunity in This Case

In this case, the UN has repeatedly asserted its immunity. *See* Exhibits 1 and 2 attached to the Government's March 7, 2014, submission (UN twice asserting its immunity in this case). Plaintiffs have not presented—and cannot present—any evidence to the contrary. Accordingly, the UN is entitled to absolute immunity from suit, and the Court lacks subject matter jurisdiction over this action. *See, e.g.*, *Baley*, 1998 WL 536759, at *1….

Any purported inadequacies in the claims resolution process referred to in Section 29 of the General Convention, or even the absence of such a process, fails to establish that the UN has expressly waived its immunity from suit. That the UN allegedly has not complied with this

obligation under the Convention does not amount to an express waiver of immunity. Indeed, as the Second Circuit has found, "crediting this argument would read the word 'expressly' out of the [General Convention]." *Brzak*, 597 F.3d at 112. In *Bisson*, for example, the plaintiff, a UN employee, filed suit against the UN for injuries she sustained during an attack on a UN facility in Baghdad. *See* 2007 WL 2154181, at *1. The plaintiff alleged that "the staff compensation system through which the plaintiff ha[d] been trudging for nearly four years did not provide for compensation for personal injury claims," and that "*there is absolutely no system whatsoever through which a third party tort victim may resolve a claim with the United Nations*." *Id.* at *9 n.21 (emphasis in original). Because the UN had allegedly failed to provide an "appropriate mode of settlement" for her tort claim in violation of Section 29 of the General Convention, the plaintiff asserted that the UN had waived its immunity. *Id.* at *9. The court disagreed, holding:

> [S]ection 29(a) of the [General] Convention does not contain any language affecting an express waiver under any circumstances. Even assuming *arguendo* that the UN and the WFP have failed to provide an adequate settlement mechanism for Bisson's claims, such a failure does not constitute the equivalent of an express waiver of immunity. An express waiver may not be inferred from conduct.

Id. The court further noted that the fact that the plaintiff was an employee of the UN—and thus could avail herself of the staff compensation system—was not material to the question of waiver. *See id.* at *9 n.22 (concluding that the plaintiff's "relationship to the defendants is irrelevant. Even if she were not an employee of the WFP or the UN, both organizations would still be immune from suit by her, and [any failure to comply with] § 29(a) still would not constitute an express waiver.").

Indeed, every court to have evaluated the UN's immunity, including the Second Circuit, has based its determination on the unequivocal text of Article 2 of the General Convention, which grants immunity to the UN, and not on the existence or adequacy of an alternative redress mechanism. *See, e.g.*, *Brzak*, 597 F.3d at 112 ("Although plaintiff[] argue[s] that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention]."); ...Therefore, the existence or adequacy of an alternative remedy is irrelevant to the Court's immunity analysis.

Nor do allegations of wrongdoing or improper motivation alter the UN's absolute immunity under the General Convention. *See Brzak*, 597 F.3d at 110, 112 (UN immune under the General Convention notwithstanding allegations of sex discrimination); *Boimah*, 664 F. Supp. at 70-71 (UN immune under the General Convention notwithstanding allegations of race discrimination); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 373 (S.D.N.Y. 1996) ("plaintiff's allegations of malfeasance do not serve to strip the United Nations or [the individual defendant] of their immunities afforded under the U.N. Convention"); *see also De Luca*, 841 F. Supp. at 535 (defendant retained immunity under the International Organizations Immunities Act ("IOIA") notwithstanding allegations of malfeasance); *Tuck*, 668 F.2d at 550 n.7 (IOIA immunity applied notwithstanding allegations of race discrimination); *Donald v. Orfila*, 788 F.2d 36, 37 (D.C. Cir. 1986) (allegations of improper motive did not strip individual of immunity under IOIA).[5]

[5] Because the General Convention provides the UN with absolute immunity, and the individual defendants with diplomatic immunity, Plaintiffs' argument that defendants' alleged malfeasance strips them of immunity fails as a

Quite simply, the UN's immunity is "absolute," absent an "express" waiver. *Brzak*, 597 F.3d at 112. Because the UN has not expressly waived its immunity in this case, it is immune from this lawsuit.

3. The General Convention's Drafting History Confirms That the UN's Immunity Is Not Contingent on the Existence or Adequacy of a Dispute Resolution Mechanism

Although the UN's absolute immunity is established by the plain meaning of the treaty, the drafting history confirms that the UN's immunity is not contingent on whether or how it settles disputes. Before the drafting history of the General Convention is addressed, it is important to note that the United States representative to the UN understood, from the date that the UN Charter was signed, that "[t]he United Nations, being an organization of all of the member states, is clearly not subject to the jurisdiction or control of any one of them and the same will be true for the officials of the Organization. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat." Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945), *reprinted in* 13 Digest of Int'l Law 37 (1963), attached hereto as Exhibit A. Thus, the work of building on the privileges and immunities provisions of the UN Charter, including the statement that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment [sic] of its purposes[,]" Charter § 105(1), was undertaken with the understanding—at least as far as the United States was concerned—that the UN would be absolutely immune from the jurisdiction of all of its members.

* * * *

The clear and consistent intent of the drafters that any waiver be express is reflected in the drafters' repeated statements that only the Secretary-General can waive the immunity of UN officials. Pl. Ex. 19, art. 8; *see also* Pl. Ex. 2, art. 7 ("While it will clearly be necessary that all officials, whatever their rank, should be granted immunity from legal process in respect of acts done in the course of their official duties, ... the Secretary-General both can waive immunity and will in fact do so in every case where such a course is consistent with the interests of the United Nations."). The drafting history, therefore, does not indicate that the UN can implicitly waive its absolute immunity, or that its immunity is contingent on the existence or adequacy of dispute resolution mechanisms.

* * * *

matter of law. In any event, plaintiffs are incorrect that the General Convention is *lex specialis* such that the IOIA has no application to this case. *See* Pl. Memo at 36 n.9. First, Plaintiffs' contention that the General Convention conflicts with the IOIA is without any support, and rests on the flawed premise that immunity under the General Convention is conditioned on providing dispute resolution mechanisms. Because there is no conflict, the courts have considered the immunities of the UN and its officials under both the General Convention and the IOIA. *See, e.g.*, *Brzak*, 597 F.3d at 112-13 (holding that the UN is immune under both the General Convention and the IOIA). Second, even if Plaintiffs' theory of the General Convention were correct, such that it did not provide defendants in this case with immunity, the IOIA would still provide them with immunity. *See id.* The IOIA simply provides an additional set of immunities for the UN and its officials.

The drafting history of the General Convention thus does not support Plaintiffs' position that the UN cannot enjoy immunity unless it provides for a dispute resolution mechanism. If anything, the drafting history reflects a bargain between the UN and its member states in which, in exchange for Section 2, which establishes the UN's absolute immunity, the UN, in Section 29, agreed to provide for dispute resolution mechanisms for third-party claims. But the drafting history does not reflect any intent to make the UN's immunity in any particular case legally contingent on the UN's providing a forum for, or satisfying the claims of, third parties in that case. In any event, however, the drafting history could not overcome the fact that the final text of the General Convention, as adopted by the General Assembly, and as ratified by the United States Senate, does not include any such condition.

4. The Foreign Authorities Cited by Plaintiffs Do Not Support Their Contention That a Breach of the General Convention Waives the UN's Immunity From Suit

Plaintiffs and the putative *Amici Curiae* fail to cite any case in which a foreign court determined that the UN waived its immunity by purportedly breaching the General Convention.

In interpreting a treaty, "opinions of our sister signatories . . . are entitled to considerable weight." *Abbott v. Abbott*, 560 U.S. 1, 16 (2010). However, the cases cited by Plaintiffs are either inapposite or otherwise unsupportive of Plaintiffs' position:

Drago v. International Plant Genetic Resources Institute (Sup. Ct. of Cassation, (Feb. 19, 2007),), *see* Pl. Memo at 23 & Ex. 16, does not involve the UN, but rather was a lawsuit against private corporation.

UNESCO v. Boulouis, *Cour d'Appel*, Paris (Fr.), Jun. 19, 1998, *see* Pl. Memo at 22 & Ex. 14, does not analyze the UN's immunities under the General Convention. There, the French Court of Appeals examined a contract between a UN agency and a private party that contained an arbitration clause, and evaluated the UN agency's immunity pursuant to Article 12 of the France-UNESCO Agreement of July 2, 1954.

Human Rights and the Immunities of Foreign States and International Organizations, in Hierarchy in International Law: The Place of Human Rights 71, Pl. Memo at 23 & Ex. 15 (in turn citing *Stavrinou v. United Nations* (1992) CLR 992, ILDC 929 (CU 1992) (Sup. Ct. Cyprus 17 July 1992), actually recognizes the UN's immunity. According to this article, the Cypriot court recognized the UN's immunity pursuant to the Convention and thereafter, apparently in dicta, "pointed out" that the UN's internal dispute resolution provided local personnel a remedy).

The Privileges and Immunities of International Organizations in Domestic Courts 332 (August Reinisch ed., 2013), which states that in *Maida v. Admin. for Int'l Assistance* (Italian Court of Cassation (United Chambers) May 27, 1955) , 23 ILR 510 (1955), the court found that the UN agency was not immune from suit because the personnel dispute process was "unlawful." Pl. Ex. 17 at 160. However, *Maida* was decided under an agreement between the International Refugee Organization (I.R.O.) and Italy, which referenced Italian law. 23 ILR 510 (attached hereto as Exhibit C). The reported decision makes no mention whatsoever of the General Convention (*see id.* at 510-15), which is not surprising, given that the I.R.O.—the precursor to the UN High Commission for Refugees—was a specialized agency of the UN, and thus its immunities were not governed by the General Convention. *See* Constitution of the International Refugee Organization art. 3 (providing for a future agreement between the I.R.O. and the UN to determine their relationship), *available at* *http://avalon.law.yale.edu/20th_century/decad053.asp#1*.

The putative *Amici Curiae* briefs likewise fail to cite any case in which a court has found that the UN's purported failure to provide alternative remedies acted as an "express[]" waiver of the UN's immunities under the General Convention. *See* Docket No. 31-1, Memorandum of Law of *Amici Curiae* International Law Scholars and Practitioners in Support of Plaintiffs' Opposition to the Government's Statement of Interest, dated May 15, 2014, at 4-5 (arguing that "the lack of an alternative and effective remedy for private law claims has been cited as grounds for courts to decline to recognize international organizations' immunity from suit," but acknowledging that such decisions "did not directly address the question of the UN's protections"); *see also* Docket No. 32-1, Memorandum of Law of *Amici Curiae* European Law Scholars and Practitioners in Support of Plaintiffs' Opposition to the Government's Statement of Interest, dated May 15, 2014("Eur. Amici Br."), at 2-5 (citing cases against a private corporation, Germany, the European Union, the African Development Bank, the Arab League, and the Permanent Court of Arbitration).

Instead, the European Scholars *Amici* point to a series of cases in which foreign courts invalidated local laws implementing UN sanctions resolutions; however, those courts also determined that they lacked jurisdiction to review the UN resolutions themselves. *See Kadi v. Council & Comm'n*, 2008 E.C.R. I-06351, ¶¶ 287, 312 (European Court of Justice invalidated a regulation passed by the Council of the European Union to give effect to a UN resolution, but also found that it had no power to review the lawfulness of resolution adopted by the UN Security Council); *Nada v. Switzerland*, 2012 Eur. Ct. H.R. 1691, ¶ 212 (European Court of Human Rights found that it had jurisdiction to review the Swiss regulation implementing a UN resolution, but did not have jurisdiction to review the UN resolution itself); *Al-Dulimi & Mont. Mgmt. Inc. v. Switzerland*, 2013 Eur. Ct. H.R. 1173, ¶¶ 114, 134 (European Court of Human Rights invalidated a Swiss regulation passed in response to a UN resolution but did not opine on the UN resolution itself, despite noting that the UN resolution failed to create an alternative dispute resolution for individuals added to sanctions list). In any event, none of these cases holds that the UN's alleged failure to provide for a dispute resolution mechanism deprives it of immunity under Section 2.

Therefore, while it is true, as the European Scholars *Amici* argue, that "encouraging respect for human rights is one of the purposes of the UN," Eur. Amici Br. at 11, the authorities cited by the *Amici Curiae* and Plaintiffs do not support their contention that the UN's immunity is conditional upon either upholding human rights or providing for a dispute resolution mechanism, nor does the text of the General Convention, the drafting history of the General Convention, or the decision of any United States court to have considered the issue support Plaintiffs' argument. The UN's immunity is simply not contingent upon any other section of the General Convention.

B. Plaintiffs May Not Assert Breach Claims Against the UN, Including MINUSTAH

Even assuming, *arguendo*, that the UN did breach the General Convention or the SOFA by failing to provide Plaintiffs with a method for resolving their tort claims, the obligations under the General Convention and the SOFA are owed by the UN to the other parties to those agreements, not to the Plaintiffs. It is those parties that have a right to invoke an alleged breach and to determine an appropriate remedy from among those legally available, not the Plaintiffs. No party to these treaties has alleged that the UN has breached either the General Convention or the SOFA, and Plaintiffs may not independently assert an alleged breach and determine their own preferred remedy.

Because "a treaty is an agreement between states forged in the diplomatic realm and similarly reliant on diplomacy (or coercion) for enforcement," courts have "recognize[d] that international treaties establish rights and obligations between States-parties and generally not between states and individuals, notwithstanding the fact that individuals may benefit because of a treaty's existence." *Mora v. New York*, 524 F.3d 183, 200 (2d Cir. 2008). As the Supreme Court explained:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Edye v. Robertson, 112 U.S. 580, 598 (1884), *quoted in Mora*, 524 F.3d at 200. Because "the nation's powers over foreign affairs have been delegated by the Constitution to the Executive and Legislative branches of government," the Supreme Court "has specifically instructed courts to exercise 'great caution' when considering private remedies for international law violations because of the risk of 'impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.'" *Mora*, 524 F.3d at 200 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004)).

Plaintiffs' arguments in this action about the alleged lack of a dispute resolution mechanism are derivative of potential claims of the parties to the General Convention. "[E]ven where a treaty provides certain benefits for nationals of a particular state, . . . it is traditionally held that any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states." *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) (finding the fact that no states party argued that the United States violated the United Nations Charter was "fatal" to appellant's claim of violation of the treaty; "the failure of Bolivia or Argentina to object to [the U.S. actions] would seem to preclude any violation of international law").

Here, both the General Convention and the SOFA provide methods by which the member states or Haiti, respectively, may dispute the UN's interpretation of the UN's obligations under these agreements. The General Convention and the SOFA provide that any dispute between a state party and the UN shall be submitted to the International Court of Justice, *see* General Convention, art. VIII, § 30; SOFA art. VIII, § 58; and the SOFA provides that any dispute between MINUTSAH and the Government of Haiti shall be submitted to arbitration, *see* SOFA art. VIII, § 57. Accordingly, the treaties provide that the Government of Haiti – not private parties – can seek redress for any purported breach of the General Convention or of the SOFA. But because Plaintiffs' claims are derivative of the Government of Haiti's, rather than arising out of Plaintiffs' own rights, Plaintiffs may not independently assert arguments based on the provisions of the General Convention or the SOFA. *See Lujan*, 510 F.2d at 67.

C. Plaintiffs' Constitutional Arguments Are Unavailing

Plaintiffs' argument that the UN's immunity from legal process and suit deprives United States citizens of their constitutional right of access to the courts has already been considered and rejected by the Second Circuit.

In *Brzak*, the plaintiffs, one of whom was a United States citizen, argued that granting the UN absolute immunity would violate their procedural due process right to litigate the merits of their case and their substantive due process right to access the courts. *See* 597 F.3d at 113. The

Second Circuit disagreed, noting: "The short—and conclusive—answer is that legislatively and judicially crafted immunities of one sort or another have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law." *Id.* (citing Act for the Punishment of Certain Crimes Against the United States, 25, 1 Stat. 112, 117-18 (1790) (acknowledging diplomatic immunity); *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812) (acknowledging foreign sovereign immunity); *Tenney v. Brandhove*, 341 U.S. 367, 376-77 (1951) (acknowledging legislative immunity); *Barr v. Matteo*, 360 U.S. 564, 573 (1959) (acknowledging executive official immunity); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (acknowledging judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (acknowledging prosecutorial immunity) (further citations omitted)). The court concluded that "[i]f appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist," and accordingly upheld the UN immunity from suit. *Brazk*, 597 F.3d at 113. Even before the Second Circuit issued the *Brzak* decision, district courts routinely found that the UN was immune from suits brought by United States citizens. *See, e.g.*, *De Luca*, 841 F. Supp. at 533 (acknowledging UN's immunity where plaintiff was a United States citizen); *Bisson*, 2007 WL 2154181, at *2 (same). Plaintiffs' access to the courts argument is therefore refuted by the case law.

* * * *

Cross References

Visa determinations for proposed representatives to the UN, **Chapter 1.C.4.b.**
Alien Tort Claims Act and Torture Victim Protection Act, **Chapter 5.B.**
ILC's work on immunity, **Chapter 7.D.2.**
McKesson v. Iran, **Chapter 8.B.2.**
Diplomatic relations, **Chapter 9.A.**